Nos. 226, 227, 243, 266.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 226.

SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

CENTRAL ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM.

No. 227.

THOMAS W. STREETER, *et al.*,

Petitioners,

v.

CENTRAL ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM.

No. 243.

THE HOME INSURANCE COMPANY and TRADESMENS NATIONAL BANK AND TRUST COMPANY,

Petitioners,

v.

CENTRAL ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM.

No. 266.

CENTRAL ILLINOIS SECURITIES CORPORATION and CHRISTIAN A. JOHNSON,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, *et al.*, HOME INSURANCE COMPANY, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THOMAS W. STREETER, *ET AL.*

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Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THOMAS W. STREETER, *ET AL.*

Opinions Below.

The opinion of the Court of Appeals (R. 12) and the opinion denying the prayers of the petitions and cross-petitions for rehearing (R. 138) are reported in 168 F. (2d) 722. The opinion of the District Court (R. 283a) is reported in 71 F. Supp. 797. The findings and opinion (R. 25a) and supplemental findings and opinion of the Securities and Exchange Commis-

sion (R. 128a) have not yet been officially reported but are set forth in the Commission's Holding Company Act Releases Nos. 7041 and 7119, respectively.

Jurisdiction.

The judgment of the Circuit Court of Appeals (R. 41) was entered on March 19, 1948. A petition for rehearing (R. 140) was denied on June 11, 1948. The petition of Thomas W. Streeter, *et al.*, for a writ of certiorari was filed on August 16, 1948 and granted on October 25, 1948. The jurisdiction of this Court is invoked under section 240 of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. §347, now §1254 of the revised Title 28 U. S. C.) and made applicable by section 25 of the Public Utility Holding Company Act of 1935 (15 U. S. C. §79y).

Statute Involved.

The applicable provisions of the Public Utility Holding Company Act of 1935 are set forth in Appendix A, *infra*, pp. 163-8.

Questions Presented.

The holding company which is being liquidated in compliance with section 11 is solvent. Under its charter, the three classes of preferred stock have a call or redemption price higher than their involuntary liquidation preference. Each of the three classes of preferred shares has an investment value at least equal to the call price. The following questions are presented:

1. Where a plan under section 11(e) of the Public Utility Holding Company Act is enforced in a dis-

trict court and there is no dispute as to the sufficiency of the evidence upon which the Commission based its finding of fairness, is the district court authorized to reject such finding on the basis of a discretionary weighing of alleged equities and in disregard of the usual limitations upon the scope of review by the doctrines of substantial evidence and administrative finality?[1]

2. Is the involuntary liquidation preference under the charter a conclusive measure of the participation of the preferred stockholders under the instant plan?

3. Did the Commission properly apply the "fair and equitable" standards of section 11(e) of the Act in approving as part of a plan the payment to the preferred stockholders of cash equal to the current going concern value of their shares but not in excess of the call price where this amount exceeds the involuntary liquidation preference of such shares under the charter?

4. Did the court below err in disregarding an improper change in the plan and approving incorrect procedure used in connection therewith both of which were sanctioned by the District Court?

5. Did the court below properly vacate the decree of the District Court and remand the proceedings to the Commission for appropriate action where the plan was disapproved as not being fair and equitable within the purview of section 11(e) of the Public Utility Holding Company Act?

[1] Question 1 may be rephrased alternatively as follows: Is the scope of review by a district court which has been requested to enforce a plan approved by the Commission pursuant to section 11(e) of the Public Utility Holding Company Act so broad that the district court may substitute its judgment as to the fairness of the plan for that of the Commission?

Statement.

History of Proceedings.

A proceeding was instituted in the United States District Court for the District of Delaware by the Securities and Exchange Commission ("the Commission") pursuant to sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935 ("the Act")[2] to effectuate a section 11(e) plan of liquidation and dissolution filed by the Engineers Public Service Company ("Engineers") with the Commission, which plan, as subsequently amended, was approved by that body on January 8, 1947 (R. 141a).

On May 15, 1947, the District Court filed an opinion (R. 283a) approving the plan except as to that portion of it which proposed to retire the outstanding three series of preferred stocks at amounts equal to the respective call prices fixed by the charter (R. 292a). The District Court found the preferred stockholders entitled to only $100 per share—the amount specified in the charter as payable in the event of involuntary liquidation. On May 29, 1947, the District Court entered its order adopting certain changes in the plan, including the creation of an escrow of the amount in excess of $100 per share and directing the retirement of the preferred stocks at $100 per share and the immediate consummation of the plan as so changed.[3]

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[2] Act of Aug. 26, 1935, c. 687, Title I §33; 49 Stat. 838, 15 U. S. C. §§79-79z-6, §79k in particular.

[3] The applications by the petitioners herein for a stay of this order of consummation, pending appeal, were denied in turn by the district court on May 29, 1947 (R. 335a), by the United States Circuit Court of Appeals for the Third Circuit on June 2, 1947 (R. 11) and a Justice of this Court on June 4, 1947. Since then the plan has been consummated except for the distribution of the fund deposited in escrow pursuant to the district court order (R. 39-40).

On May 29, 1947,[4] the petitioners filed their appeal from the District Court order in the Court of Appeals for the Third Circuit from which order appeals were also subsequently taken on behalf of the Commission and the Home Insurance group of preferred stockholders. On March 19, 1948, the Court of Appeals filed its opinion (R. 12), affirming the decision of the District Court that the plan as submitted by the Commission was unfair and inequitable but vacating the decree of the District Court approving the plan as amended, with directions to enter an order of disapproval and to remand to the Commission for further and appropriate action by it. On June 11, 1948, the Court of Appeals filed its opinion denying the prayers of the petitions and cross-petitions for rehearing (R. 138).

History of the Company.

Engineers was incorporated in Delaware in 1925 primarily to acquire and own public utility properties.[5] The Engineers system was put together by Stone & Webster, Inc., an engineering firm engaged in the business of supervising operating public utilities, the acquisition of properties for its own account and the issuance and distribution of securities. Its first subsidiary was Virginia Electric & Power Com-

[4] One of the petitioners herein is Thomas W. Streeter, a director and preferred stockholder of Engineers, who dissented from the initial plan as unfair in its proposal to retire the preferred stock at $100 per share. At Streeter's insistence the Board of Directors authorized the preferred stockholders to employ independent counsel to insure that the rights of those stockholders would be adequately represented before the Commission and in the courts (R. 473a).

[5] For a complete history of the formation of Engineers see Federal Trade Commission, *Utility Corporations*, No. 66, Senate Doc. 92, Pt. 66, 70th Cong., 1st Sess., pp. 41, 564-572.

pany ("Virginia") which was acquired from Frank Gould who is now one of the largest common stockholders[6] of Engineers. Successively, between incorporation and December 1928, control was acquired of Key West Electric Co., Eastern Texas Electric Co., El Paso Electric Co. (Del.), Savannah Electric & Power Co., Baton Rouge Electric Co., Ponce Electric Co., and Puget Sound Power & Light Co.

The system sprawled over many states and was composed of a great many separate corporate entities. From the beginning, long before the Act, the management inaugurated a policy of system simplification (R. 1648a, 1464a). In accordance with this same policy after enactment of the Act, Eastern Texas Electric Co.[7] was dissolved and Gulf States was transferred directly to Engineers. Thereupon Baton Rouge Electric Co. and Louisiana Steam Generating Co. were merged with Gulf States.

By 1930, Stone & Webster, Inc. had acquired direct ownership of over 90% of the common stock of Engineers (R. 1686a). In December, 1937, after the registration provisions of the Act had been upheld as constitutional, Stone & Webster distributed its holdings to its own stockholders (R. 1501a). However, this distribution of the common stock did not disturb the control which the Stone & Webster interests exercised over Engineers.[8] Although there are over 12,000 common stockholders, 338 or 2.52% of them own 72.54% of the stock and of this amount the greatest number of shares is owned directly or in-

[6] See Engineers' Exhibit 43, R. 1769a.

[7] Eastern Texas Electric Co. was a holding company controlling the present properties of Gulf States Utilities Co. ("Gulf States") and the Western Public Service Co.

[8] R. 726a-729a. See the lists of officers and directors in the annual reports, Engineers' Exhibit 37-A-37-T, R. 1432a-1641a.

directly by members of the Stone and Webster families (R. 567a-570a).

Of the major subsidiaries acquired by Engineers, all but Puget Sound Power & Light Co. ("Puget"), which represented one-third of the system's properties (R. 1673a), were profitable investments and were still part of the system at the time of the Court's order. These subsidiaries were Virginia, Gulf States and El Paso Electric Co. ("El Paso") which had passed directly to Engineers when its parent El Paso Electric Co. (Del.) was dissolved in 1944. Puget, on the other hand, was a disastrous fiasco as far as Engineers was concerned.[9] The other subsidiaries consisted of small companies which never contributed much, if anything, in the way of earnings to the system and which were ultimately disposed of, on the whole, at a profit to Engineers.

The management, from the outset, had pursued a conservative financial policy with respect to paying dividends on the common stock, recognizing the desirability of building up adequate equities in the subsidiaries as well as in the parent company.[10] Even so in 1936, the Company was forced to write down the common stock from $58,059,513 to $1,909,968 in order to create a capital reserve which would be available to absorb the loss which was evident in the Puget venture and thus to permit the resumption of preferred dividends (R. 1481a). In May, 1938, a reserve of $35,000,000 for losses in investments was created and

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[9] R. 1608a. See *Puget Sound Power & Light Company*, 13 S. E. C. 226 (1943).

[10] R. 1554a, R. 1666a, R. 1676a, R. 1687a, R. 1713a, R. 1444a. In 1938, C. W. Kellogg, then chairman of the Board of Engineers, wrote that "common stock money is the one final and necessary foundation that makes the whole structure stand up." Kellogg, *Audit of 1937 Electric Utility Business*, Electrical World, January 15, 1938.

as a result there was no earned surplus available for dividends on the common stock. From that time on, although there were earnings applicable to the common stock, the management felt that it was "clearly desirable to accumulate additional earned surplus to improve the stability of the Company before consideration is given to a dividend on the common stock" (R. 1537a), and, in addition, for many years prior to the filing of the plan, dividends on the common stock were withheld because of a desire on the part of the controlling interests for capital appreciation and to avoid payment of high personal income taxes.

Integration Proceedings.

On February 21, 1938, Engineers registered with the Commission and on February 28, 1940, the Commission instituted integration proceedings under section 11(b)(1) of the Act. In 1941 the Commission ordered the Company to dispose of its interests in two subsidiaries. The Company did not contest this order. On September 16, 1942, and October 6, 1942, the Commission issued other divestment orders which were set aside by the Court of Appeals for the District of Columbia, the cause being remanded to the Commission. *Engineers Public Service Co.* v. *S. E. C.*, 138 F. (2d) 936 (App. D. C., 1943) cert. granted, 323 U. S. 723 (1944). Certiorari was granted by the Supreme Court, but disposition was not had because of the lack of a quorum. In the meantime, Engineers disposed of the properties which were the subject of Commission's orders, in the consummation of the plan, approved and enforced by the District Court's order dated May 29, 1947, after the denial of the stay in turn by the two courts below and a Supreme Court

Justice. On October 20, 1947, this Court dismissed the appeals as moot.[11]

Proceedings before the Commission.

On September 10, 1945, during the pendency of an action before this Court to test the validity of the Commission's divestment orders under section 11(b)(1) of the Act, the Company filed a plan (R. 1307a) under section 11(e) of the Act which was designed to effect compliance with those divestment orders and which also provided for the elimination of Engineers although such action had not been required by the Commission.

This plan was the culmination of efforts of the management stemming from about 1941 during which period several types of plans were considered and discarded.[12] Among some of the possible alternatives were liquidating holding companies, distributions in kind, a one stock reorganization, a "package" distribution, a "preferential common" reorganization, a voluntary take down plan, a partial payment plan, and a voluntary exchange plan.

After consultation with the major common stockholders it was decided that the primary objective to be attained was the ultimate elimination of the preferred stockholders from the enterprise so that the common stockholders would obtain direct ownership of the underlying companies.[13] This aim was to be accomplished with two other objectives in view: first, to obtain the greatest possible tax savings for the common stockholders (R. 756a), and second, to stop

[11] 332 U. S. 783 (1947).

[12] R. 475a, 481a, 482a, 675a, 688a, 689a, 691a, 707a, 709a, 715a, 717a, 718a.

[13] R. 583a, 643a, 687a, 719a, 723a.

the accrual of dividends on the preferred stock (R. 446a-448a, 650a).

Accordingly, a plan was fashioned which was split into parts. Part I, among other things, proposed the issuance of transferable warrants to the common stockholders which would permit the acquisition of Gulf States common stock upon the payment of $11.50 per share and thereafter the immediate retirement of the three series of outstanding preferred stocks,[14] at the involuntary liquidation price of $100 per share plus accrued dividends.[15] This retirement of the preferred stock was to be accomplished by a deposit of $100 in cash by Engineers in favor of the stockholder.[16] Subsequent to the retirement of the preferred stock, Part I of the plan proposed the distribution of the remaining assets to the common stockholders.

Part II of the plan was intended to afford a means for permitting the later determination of the question whether the preferred stockholders were entitled to any amount in excess of $100 per share.

Part III of the plan proposed the elimination of Engineers either by way of dissolution or by merger with Virginia (R. 1320a). During the hearings before the Commission the merger alternative was removed by amendment for the stated reason that such a course would no longer result in substantial tax savings. This amendment was filed after it was ascertained that a merger was not to be deemed a dissolution or liquidation of Engineers within the mean-

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[14] $5 series, $5.50 series and $6 series. Engineers had no debt.

[15] The pertinent charter provisions are set forth in R. 1412a.

[16] The common stockholders who owned preferred were given the option of exchanging the preferred for Gulf States stock (R. 41a). Of course, the exchange of preferred would reduce the cash requirements. The record does not show how many shares were exchanged.

ing of the Charter and, in which event, the statutory appraisal provisions of Delaware or Virginia with respect to the rights of the preferred stockholders might be applicable.[17]

The purpose of splitting the plan into parts was to secure an order from the Commission which would authorize the retirement of the preferred stock and the termination of dividends before the extent of the rights of the preferred stockholders was determined. Director Streeter objected to this splitting device (R. 778a) and the management admitted that if Parts I and II were combined the preferred stockholders would be entitled to dividends until their rights were "finally settled".[18]

Following the termination of extensive hearings before the Commission, counsel for Engineers made a motion (R. 1203a) on January 30, 1946, to separate Parts I and II of the plan and for an order permitting the consummation of Part I.

The preferred stockholders resisted this motion on the ground that the common stockholders had no right to terminate the preferred stockholders' interest in the enterprise pending the determination of the extent of their claims unless the stock were called in accordance with the Charter. The Commission took the motion under advisement.

On December 4, 1946, the Commission issued its findings and opinion (R. 25a, H. C. A. R. No. 7041), in which it found, among other things, that although the plan was necessary to effectuate the provisions of section 11 of the Act, it was unfair to the preferred stockholders in its proposal to retire their stock at $100 per share. The Commission was of the view

[17] R. 495a, 538a, 589a, 590a, 650a, 653a, 712a-714a, 915a.
[18] R. 779a. See also R. 448a, 531a, 649a, 650a, 780a-781a.

that under the principles enunciated in *Otis & Company v. S. E. C.*, 323 U. S. 624 (1945), the preferred stockholders were entitled to the current investment value of their securities and that such value was at least equal to the respective call prices of the three series of outstanding preferreds, namely, $105 for the $5 preferred and $110 for both the $5.50 preferred and $6 preferred. The Commission reached this conclusion after (a) consideration of "all provisions of the charter applicable to the preferred, such as the dividend rate and the call price, as well as the liquidation preferences", (b) analysis of "the financial condition of the company, with particular regard to the asset and earnings coverage of the preferred" (R. 62a), and (c) reference to the undisputed testimony of both the preferred stockholders' and the Company's witnesses that the intrinsic values of the preferred were considerably in excess of the call prices (R. 67a). However, the Commission was of the opinion that the call prices placed a ceiling on the right of the preferred to participate in the distribution of the assets (R. 67a).

The Commission also found that it could not grant the Company's motion to split the plan but stated that it would approve an amendment to provide an arrangement whereby the amount in excess of $100 per share could be deposited in escrow in the event the Company desired to litigate the Commission's findings with respect to the rights of the preferred stockholders (R. 75a). However, in the event of an escrow, the Commission held that the preferred stockholders would be entitled to interest on the escrowed amount as additional compensation for the delay in payment. The Commission stated that if the Company did not amend the plan in accordance with its views, an order disapproving the plan would be entered (R. 73a, 299a).

Within the time specified, Engineers filed a new plan. This plan proposed to retire the preferred at their respective call prices.[19] It contained no splitting device and made no mention of an escrow. Under the terms of the plan the dividend rights of the preferred were to be terminated only upon the receipt of the full call prices.[20]

The Commission thereupon issued its Notice of Filing of Amendment and Order for Argument and Hearing on Plan, as Amended, and Order Reopening Record (R. 417a). This notice was sent to all the stockholders by the Company and in an accompanying letter (R. 1937a.) they were informed that Engineers had decided not to contest the Commission's finding that the preferred stockholders were entitled to the call prices.

At the hearing, two groups of common stockholders who had not previously participated, objected to the treatment proposed to be accorded the preferred. However, no evidence was offered although the record had been reopened for that purpose. Counsel for the Streeter group contended that the plan, as amended, did not accord the preferred stockholders their full rights because it contained no provision for continuing the preferred dividends or even for the additional compensation which the Commission had found should be paid the preferred stockholders in the event of delay (R. 1294a, 1299a).

On January 8, 1947, the Commission issued its supplemental findings and opinion and order among other things (a) approving the plan as amended, (b) direct-

[19] The feature whereby the preferred could be exchanged, at a value equal to the call prices, for Gulf States stock was retained. As before this alternative was available only to common stockholders who also owned preferred and to preferred stockholders who were able to acquire warrants.

[20] R. 105a-106a, 107a-108a.

ing its counsel, in accordance with Engineers' request, to proceed with court enforcement, and (c) finding it fair and equitable to provide an escrow arrangement subject to the enforcement court's jurisdiction in the event of delay due to further litigation (R. 128a, 141a).

Court Proceedings.

In accordance with the Commission's direction, an application (R. 4a) was filed on January 9, 1947, with the United States District Court for the District of Delaware. Prior to the hearing before the District Court, in accordance with a prescribed notice (R. 175a) to all stockholders, written objections were filed to the Commission's application and its findings. Counsel for the Streeter group, alleging the fairness of the plan as presented for enforcement, objected to any change to permit the termination of the rights of the preferred stockholders in the manner suggested by the Commission. The only other objectants were two common stock groups (four stockholders out of over 12,000) which hold 7,000 shares or .3% of the 1,909,968 shares of common stock outstanding. These shares were acquired by these two groups between 1943-1946 (R. 1287a), immediately prior to and during the pendency of these proceedings and subsequent to the Commission's decision in *The Western Public Service Company*, 12 S. E. C. 804, 814 (1943), case where it was publicly announced that it was Engineers' contention that, in the event of the liquidation of Engineers under Section 11 of the Act, the charter liquidation provisions would not govern the rights of the preferred stockholders who would be entitled to the fair value of their expectations absent such proceeding.

On February 7, 1947, the President of Engineers,

apparently without prior authority from the Board of Directors, wrote a letter (R. 271a, 394a) to the Commission requesting that the Commission amend its order of January 8, 1947, so as to permit the consummation of the plan by an "alternative" method and to make the recitals required by Supplement R of the Internal Revenue Code so as to entitle Engineers to certain tax relief.

Pursuant to this request and without notice to the preferred stockholders or an opportunity to be heard thereon, the Commission entered a so-called Order of Amendment (R. 165a) on February 11, 1947, which among other things purported to approve, in advance, the changing of the plan so that it could be split and consummated in a manner similar to that proposed in the original plan[21] by an alternative method through the use of an escrow.[22]

At the hearing before the District Court on February 17, 1947, counsel for the Commission made a motion (R. 162a) to amend its application by incorporating the Order of Amendment. The motion was granted (R. 163a) over the objections (R. 181a) of counsel for the Streeter group whereupon a Supplemental Statement of Objections, directed to the Commission's application, as amended, was filed (R. 177a).

At the hearing, counsel for Engineers stated that it appeared likely that the *common stockholders* would appeal and that Engineers desired to follow the alternative method of effectuating the plan (R. 278a). He submitted to the Court a form of Escrow Agreement (R. 408a) which he stated had been worked out by the Company and the Commission's staff.[23] Counsel

[21] R. 170a-171a.

[22] It is the Commission's view that the Order of Amendment did not constitute an amendment to the plan, R. 169a, 389a.

[23] R. 277a. While the matter was under advisement, counsel for Engineers sent a revised form of Escrow Agreement to the District Court.

for the Streeter group contended that this alternative method constituted a material change in the plan and that the Act required the Commission to afford the preferred stockholders an opportunity for hearing as to the fairness of the changes and the adequacy of the Escrow Agreement (R. 177a-179a).

On May 15, 1947, the District Court filed an opinion in which it concluded "that because of the provision for payment of premium, the plan does not meet the requirements of fairness and equity. With the exception of the payment of redemption premiums, the plan is approved including the Escrow Agreement" (R. 292a). It was the District Court's view that a "§11(e) court has the affirmative and independent duty to consider and find whether a proposed plan, which has been approved by the Securities and Exchange Commission, is fair and equitable" (R. 286a). Stating that the quantum of participation to be allowed the preferred stockholders under §11 was to be measured by standards of "colloquial equity", the District Court found that the investment value of the preferred stock was not controlling but was just one of the elements to be considered and that "after consideration of all factors involved" (including issue price, market history, losses due to divestments, "past sacrifices", etc.); it concluded "that $100 would be fair and equitable, but that the payment of premiums would not be fair and equitable" (R. 288a).

Subsequently, on May 26, 1947, counsel for the Commission submitted a proposed form of order (R. 416a) embodying the alternative method of consummation which had been previously approved by the Commission and elected by the Company for the purpose of being adopted in the event of the likelihood of an appeal by the *common stockholders*. This proposed order treated the plan as "supplemented" to include an escrow agreement and certain incidental

changes and incorporated a revised Escrow Agreement which had been submitted to the District Court *after* the hearing on February 17, 1947.[24]

Counsel for the Streeter group opposed the entry of the proposed order (R. 361a-365a) for the reasons *inter alia* that: (1) the District Court had no power under the Act to enforce a plan which it had failed to approve *in toto;* (2) the District Court had no power to rewrite the plan in the first instance; (3) if the District Court had the power to adopt changes it was required by the Act to give notice and afford an opportunity for hearing; (4) the Escrow Agreement was inadequate to protect the interests of the preferred stockholders; and (5) the plan would be unfair to the preferred stockholders if it terminated their dividends in violation of their rights under the charter.

On May 29, 1947, the District Court entered its findings of fact and conclusions of law (R. 293a) and an order (R. 318a), among other things, (a) adopting the alternative method of consummation via an escrow arrangement, (b) directing the retirement of the preferred stock at $100 per share [despite the Commission's finding that such treatment was unfair] and (c) the immediate consummation of the plan, except for the proposed allowance of the so-called premium. In accordance with this order, the plan has been carried into effect, except for the distribution of the fund deposited in escrow (R. 39-40).

[24] See footnote 23. The record demonstrates that if was never contemplated to follow the alternative method in the event the Court *failed* to approve the plan. Counsel for Engineers stated before the District Court (R. 269a, 280a) that the failure of the District Court to approve the payment of the call prices would prevent the carrying out of the plan. Moreover, the Escrow Agreement attached to the proposed order (R. 424a) was different in this respect from the agreement which had been submitted to the Commission on Feb. 7, 1947 (R. 402a), and to the District Court on Feb. 17, 1947 (R. 408a).

On the appeals filed by the Commission and the Home Insurance and Streeter groups of preferred stockholders, the Circuit Court affirmed the decision of the District Court that the plan, as approved and submitted by the Commission was unfair and inequitable, and vacated the District Court's decree for its error in amending the plan to substitute its own estimates of values and approving and enforcing the plan as so amended. It directed the return of the record for further and appropriate action by the Commission, the remaining problem being one of valuation. The Circuit Court also noted that in view of its denial of the Streeter motion for a stay made shortly after the entry of the District Court's order of approval and enforcement, the plan had been carried into effect except for the payment of the fund deposited in escrow (R. 39-40).

The rationale of the Circuit Court's decision hinges primarily upon two concepts—(1) the function of a section 11(e) court, and (2) the standards of valuation for determining equitable equivalents. With respect to the first concept the Circuit Court concluded that a "Section 11(e) court must exercise its full and independent judgment as to the fairness and equity of the plan" (R. 33) and expressly refused to apply the substantial evidence rule to a section 11(e) proceeding (R. 33), and also refused to follow the principles that "unless the conclusions of the Commission lack rational or statutory foundation they may not be disturbed by the section 11(e) court or that a reversal of the Commission's judgment by the court may not be effected save where the Commission has plainly abused its discretion" (R. 34).

In reference to the standards of valuation, the court below held that "All pertinent factors and all substantial equities must be considered by the Commis-

sion whether equitable equivalents are to be reached by the approach *ex* the Act or the approach *intra* the Act" (R. 38). It stated that the Commission has "misunderstood the principle of 'equitable equivalents' enunciated by the Supreme Court in the *Otis & Co.* case"; that "the new doctrine of investment value * * * may not be substituted for the doctrine of equitable equivalents"; and that "investment value is and can be only one of a series of factors to be used in arriving at equitable equivalents" (R. 38, 39). The court below also criticized the Commission for its alleged errors in (a) failing to give adequate consideration to such "equities" and "factors" as losses occurring to Engineers by virtue of the divestitures compelled by the Act, future earning power, etc.; (b) adopting inconsistent techniques in valuing the preferred "*ex* the Act" and the common "*intra* the Act"; (c) making "no finding as to the 'value' of the common stock"; and (d) disregarding the fact that "the holding company enterprise is at an end; both for the preferred and common", which fact (according to the court below) differentiates the instant case from The United Light & Power Company reorganizations (R. 35, 36).

Petitions for rehearing were filed on behalf of the Commission and the Home Insurance and Streeter groups of preferred stockholders for the reason, among others, to obtain clarification of various aspects of the opinion below relating to the functions of a section 11(e) court vis-a-vis the Commission and the standard of valuation in simplification proceedings. Answers and cross-petitions were filed on behalf of two groups of common stockholders. The court below denied the prayers of the petitions and cross-petitions, stating that "neither the Commission, nor the district court, nor this Court possesses the power to waive the provision of section 11(e) providing for approval of a

plan of reorganization as fair and equitable" (R. 139). It refused to treat the Commission's amendatory order of February 11, 1947 or its approval of the escrow agreement as a rejection of Commission's statutory role—the order (according to the court below) being merely a device to expedite execution of the plan of reorganization after the requisite statutory approval. In view of its affirmance of the District Court's disapproval of the plan as unfair and inequitable, the court below directed the Commission to reconsider the problem presented in the light of its opinion or "procure the review" thereof by this Court (R. 140).

Summary of Argument.

I.

The district court and the Commission exercise cooperative and complementary roles under section 11(e) of the Act. Such view is consistent with the legislative history of the Act and receives support from the language of the Act and analogous reorganization statutes and precedents. That statutory scheme should not be distorted by a judicial urge for power in disregard of the legislative division of function between the Commission and the district court. The section 11(e) court is not, as the court below states, a traditional court of equity; nor for that matter do we contend that it is *only* a court of review. Rather do we urge that the powers of the 11(e) court consist of both equity and review functions.

The Commission and the court, we submit, work cooperatively in the process of simplification. That cooperation envisages the recognition by the district court of the sifting procedure of an expert administrative body and the performance of judicial duty in that light with adequate regard for the findings and

judgment of the Commission. On such approach the district court should sustain and not reject the administrative findings and determination of fairness, as well as value and equivalence, if supported by substantial evidence and having warrant in the record and the law. The district court may not substitute its judgment (except for a plain abuse of discretion) for that of the Commission by its own discretionary weighing of alleged "colloquial" or "special" equities. Therefore, the rejection by the court below of the doctrines of substantial evidence and administrative finality as limitations upon the scope of the district court's power under section 11(e), we contend, is erroneous.

The limitation upon the district court's review function in passing upon a plan under section 11(e) accords with the prevailing authorities under the Act and with the decisional and statutory trends in the general field of administrative law and squares with the corresponding responsibility of the court of appeals under section 24(a) in the direct review of administrative action affecting section 11(e) plans. The recognition of the coordinate roles of the district court and the court of appeals under sections 11(e) and 24(a) respectively, in the light of the Commission's primary responsibility for the approval of all plans regardless of enforcement will greatly facilitate the uniform and expeditious administration of the Act.

II.

The Commission and the courts below properly applied the principle of the *Otis* case that the charter liquidation preferences are not conclusive as to the *quantum* of the participation to be accorded security holders in simplifications or reorganizations under the

Act. The Engineers' charter of 1925 could no more contemplate the action required than the 1929 charter involved in the *Otis* case. Furthermore, *Congress* did not intend the exercise of its power to simplify, to mature the liquidation preferences. That view is equally applicable, regardless of the method of simplification (merger, dissolution, liquidation) or the procedural sequence thereof. The *Otis* case makes clear that the security holders' participations are to be measured on a going concern basis and "not as though a liquidation were taking place". If however, this court should conclude that the charter liquidation provisions are operative, it is then urged that the voluntary liquidation preferences (and not the involuntary) should be determinative under the circumstances of the instant case. In any event, even if the voluntary liquiidation provisions are not determinative, the involuntary liquidation preference, if applicable, must not stand in the way of Congressional objectives and cannot control in the determination of a fair and equitable plan under the statute and the constitution.

III.

The Commission properly applied the principle of full priority and the correct technique under the fair and equitable standard in the valuation of the respective interests of the preferred and common stockholders. Under the plan the Commission approved a cash payment to the preferred stockholders for the surrender of their interests in the Company and the receipt by the common of the residual assets in exchange for their intgrests. In reaching this conclusion, the Commission deemed the charter provisions not conclusive as to the measure of the respective

participations but proceeded with a detailed valuation of the preferred stock on a going concern basis, considering all the provisions of the charter applicable to the preferred, such as dividend rate, call price and liquidation preference, and making a careful financial analysis of the Company with particular regard to the asset and earnings coverage of the preferred. Such approach accords with the principles enunciated in the *Otis* case. Under the *Otis* case, the principle of full priority requires that each security holder receive the equitable equivalent of the rights surrendered on a going concern basis. This bundle of rights must be valued as though in a continuing enterprise or a going concern apart from the reorganization. In the evaluation thereof the liquidation preferences are not matured by the impact of the Act. In both the *Otis* and the instant case, the two classes of stockholders were given the equitable equivalents of their participations on a going concern basis and in neither was the Act permitted to mature the liquidation claim which might be greater or less than the existing values. Contrary to this approach, the court below presumably recognizes the full priority rule but erroneously requires the Commission to measure the respective participations on the basis of a nebulous standard of so-called "colloquial" or "substantial" equities. This ambiguous standard substitutes for the well-defined rights of the security holders such indefinite alleged "colloquial" equities as issue price and market history, retention of earnings and conjectural losses from past divestments under the Act. The views of the courts below stress supposed equities which are both factually unsound and legally unimportant and involve a veering away from elements such as current rights to earnings and assets which

are entitled to primary weight. These substitute criteria for the determination of the respective participations by irrelevant factors extrinsic to the contract rights of the security holders, afford no rational basis for the uniform administration of the Act. In requiring the valuation "as if the Act had never been passed" (R. 35), the court below has not applied the principle of valuation on a going concern basis as enunciated in the *Otis* case. In addition, the valuation directed by the court below makes necessary a retroactive readjustment of profits and losses since the passage of the Act and thus imposes an insuperable burden upon the Commission.

The court below also erroneously required a dollar valuation of the common stock interest where the preferred stockholders receive cash and the common stockholders, by choice, receive residual assets. In the instant case, the Commission valued the preferred on a going concern basis, leaving the residual interest for the common. The preferred stockholders were found entitled, according to the Commission, to amounts at least equal to their redemption prices as the equitable equivalent of the rights surrendered and the common were entitled to the remaining assets in exchange for their rights, there being no need to place a dollar value on the residual interest. In thus valuing the preferred stocks, the Commission has followed the usual technique in valuing senior securities upon retirement unaccompanied by a liquidation of the company, in which event the junior securities receive the residual assets as in the instant case. Dollar valuation would serve no useful purpose in the instant case where the Commission has expressly found that "the plan is fair to the common stockholders" and that the "retirement of the preferred stockholders will be of immediate benefit to the common stockholders".

The Commission has applied the correct technique in the valuation of the preferred in the instant case, where at the choice of the common stock management, the preferred are eliminated by a cash payment. This method of compliance with the Act by the elimination of the preferred by a cash payment, is far different from the situation where an indefinite projection of earning capacity is made and apportioned since they involve the formation of a new company and the allocation of the interests therein. In any event, the Commission took into account such criteria as earning records, asset coverage, earning capacity, etc., all of which provide a proper basis for valuation. The facts of this case amply warrant the conclusion reached by the Commission.

Other criticisms directed by the court below at the Commission are also based upon a misconception of the correct principles and techniques of valuation and consequently are erroneous.

IV.

The court below also committed two other errors. First, it disregarded a change in the plan by the District Court. Over objection, the District Court by its order altered the plan through the creation of an escrow so that the dividend rights of the preferred stockholders were terminated prior to the receipt of the full amount of the current value of their stock as limited by the call prices. Such premature termination is unwarranted. In the second place, the procedure whereby the plan was modified or amended to provide such escrow was irregular in that it was accomplished without notice and an opportunity to be heard. This arbitrary procedure is contrary to the statute and the constitution.

V.

Assuming *arguendo* that this Court concludes that the Commission has erred in its valuation, then the question of remand comes to the fore. On the assumption of a proper disapproval of the plan, the court below correctly directed a remand to the Commission for appropriate action. The District Court has no power to amend the plan and reduce the participation of the preferred stockholders, and then to approve and enforce the plan as so amended. As the issue under such circumstances is one of valuation, remand to the Commission for its determination is necessary.

ARGUMENT.

I. The Court Below Erred in Holding That the District Court Has the Power to Reject the Commission's Findings and Determinations of Value, Amply Supported by the Record, on the Basis of a Discretionary Weighing of Alleged "Colloquial" Equities and in Disregard of the Doctrines of Substantial Evidence and Administrative Finality.

A short recital of the views of the Commission and the two courts below will serve to focus attention upon the issue. After consideration of all charter provisions, financial analysis (R. 62a) and reference to undisputed expert testimony as to the intrinsic values of the preferred, the Commission found that the preferred stocks had current investment values at least equal to their respective call prices[25] and

[25] The undisputed testimony of the expert witnesses indicated that the fair investment values of the preferred were considerably in excess of the call prices but the Commission was of the opinion that the call prices placed a ceiling on the right of the preferred to participate in the distribution of the assets. The effect of the charter provision is discussed in point II below and the valuation process in III below.

that fairness and equity required the payment to the preferred of such amounts on retirement (or $105 for the $5. preferred and $110 for both the $5.50 and $6. preferred) (R. 67a-68a) instead of $100 per share for each series.

On the other hand, the District Court, as examination of its opinion and findings[26] discloses, ignored the Commission's findings with respect to the fairness of the plan and more particularly with respect to its determination of value and equivalence and weighed various alleged "colloquial" equities in its own scales, and, arrived at the conclusion that "because of the provisions for the payment of premium,[27] the plan does not meet the requirements of fairness and equity" (R. 292a). In other words, the District Court shifted emphasis from the group of elements which the Commission considered important to another group of circumstances—alleged "colloquial" equities[28] which the Commission undoubtedly considered but did not deem particularly significant.

On the appeal, the court below held "that a Section 11(e) court must exercise its full and independent judgment as to the fairness and equity of the plan" (R. 33) and sustained the District Court's rejection

[26] It is clear that the District Court rejected "such findings and conclusions of the Commission [that] relate to or bear upon the payments of the premiums or are inconsistent with the Opinion dated May 15, 1947 or with the findings and conclusions of law filed with said Order" (R. 293a-294a). Likewise, it can hardly be fairly claimed that the District Court's findings, Nos. 36-38 (R. 307a-308a) are consistent with the Commission's findings (R. 69a-72a).

[27] This characterization as "premium" merely begs the question, since the charter provisions were deemed not controlling.

[28] The District Court took the position that certain "colloquial" equities such as the issue price of the preferred stocks (its market history), alleged losses due to divestments, the past "sacrifices" of the common stock because of retained earnings, etc., "look toward the non-payment of the premium" (R. 288a *et seq.*).

of the Commission's findings on the basis of its own discretionary weighing of alleged equities in the exercise of its independent judgment (R. 34). Furthermore, it denied the applicability of the substantial evidence doctrine to the Commission's findings and refused to hold that the Commission's conclusions may not be disturbed by a section 11(e) court unless they lack "rational or statutory foundation" or that the Commission's judgment may not be reversed by such court except for a clear abuse of discretion (R. 33, 34).

The issue thus presented may be stated in a variety of ways. One statement of the question is whether a section 11(e) court is free to reject the findings or determination of the Commission, respecting the fairness of a plan (or its valuation of a security interest or the equivalence thereof) when based upon substantial evidence and possessing a rational basis and proper statutory foundation. Stated in another way, it is the extent to which a district court which has been requested to enforce a plan approved by the Commission pursuant to section 11(e) of the Act, may substitute its judgment as to the fairness of a plan for that of the Commission. Stated more narrowly, the question posed is whether a district court in an 11(e) enforcement proceeding is authorized to reject a finding of fairness of the Commission (which is based upon evidence, the sufficiency of which is not in dispute) on the basis of a discretionary weighing of alleged "colloquial" equities, without regard to the limitations upon the scope of review which this Court has held to apply to a court of appeals in direct review under section 24(a) of the Act. Simply put, the dispute in this aspect of the case, affects the treatment to be accorded the Com-

mission's findings or determination of fairness by a section 11(e) court.

Basic to this issue is the relative function of the section 11(e) court[29] vis-a-vis the Commission in passing upon the fairness of a plan. The legislative history, when impartially examined, will, we contend, disclose a Congressional intention to make an extensive grant of power to the Commission and to establish the district court and the Commission in complementary and cooperative roles. This view of the complementary functions of the court and Commission under section 11(e) of the Act is borne out by the provisions of the Act and is consistent with analogous precedents in the law of reorganization. Full force and effect to such cooperative role requires the court to give considerable weight to the action of the Commission, and to sustain the Commission's findings if supported by substantial evidence and having warrant in the record and the law and not to reverse the Commission's judgment except for a plain abuse of discretion. Consequently, we urge that the court below erroneously defined the relative functions of the section 11(e) court and Commission in the light of a strong predilection for the judicial power and erred by rejecting the doctrines of substantial evidence and administrative finality in its delineation of the scope of review by a section 11(e) court.

A. The Court Below Examined the Legislative History, the Provision of the Act and the Law of Reorganization With a too Jealous Regard for the Judicial Role.

The provisions of section 11 as well as its legislative history and the law of reorganizations must *not* be

[29] The court below indicated that a "question of law which * * * goes to the heart of the instant controversy" concerns the "extent of the "power conferred on the district courts of the United States by the Act" (R. 20).

"read * * * through the distorting lenses of inapplicable judicial doctrine".[30] In its approach to the problem of the status of the district court under section 11(e), the court below postulated a premise, to which it strongly adhered, that a "section 11(e) court must function as an equity reorganization tribunal with the powers and functions of such a court, and not a review court" (R. 30), and must exercise the "general equity jurisdiction of the reorganization tribunal" (R. 29). Rigorous adherence to that concept of a traditional equity reorganization court, in the "classical" pattern permeated the views of the court below and caused it to stray outside its province. It examined in this distorted light the legislative history, the provisions of the Act, and the law of reorganization. As will hereafter appear, a proper analysis and review in the foregoing respects, will demonstrate the error of the conclusions by the court below. There evolves the concept of the cooperative role of the Commission and the court under section 11(e), which envisages judicial action aided by the sifting procedure of the Commission and predicated upon the Commission's initial determination.

1. Congress intended the court and the Commission to perform complementary roles and did not intend the section 11(e) court to act as a "classic" court of equity.

Congress has provided the basic outline or machinery in section 11 of the Act for the course the integration and simplification of holding company systems is to take. It established standards of administration and placed in the hands of the Commission the primary responsibility for the development of a fair and equitable plan. Upon examination to

[30] *F. C. C. v. Pottsville Broadcasting Co.*, 309 U. S. 134, 144 (1940).

learn the purpose of its enactment, section 11 reveals the intention of Congress to place simplification under the aegis of the Commission, subject to a degree of participation by the Court. Cf. *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 468 (1943).

Proper perspective of the Congressional division of function between the district court and Commission can more readily be discerned from a survey of the entire legislative history of section 11 of the Act rather than from reference to isolated segments of that history. The original bill (S. 1725)[31] which was introduced on February 6, 1935, was drafted so as to lodge with the Commission the direction of the process of reorganization, with limited participation by the court. The primary role of the Commission and the subordinate status of the court is evident from the provisions of the original bill.[32] That view finds

[31] Title I of the Public Utility Holding Company Bill S. 1725 is identical, except for section numbers, with Title I of the House bill (H. R. 5423), which was also introduced on February 6, 1935, in the House of Representatives by Congressman Rayburn [Hearings Before the Senate Committee on Interstate Commerce (74th Cong., 1st Sess.), p. 49]. It should be noted that Title II dealt with amendments to the Federal Water Power Act.

Subsections (c) and (d) of S. 1725 have been excerpted and included in Appendix "B" below.

[32] In general, section 11 of the original bill provided as follows: subsection (a) required the essential preliminary studies by the Commission of existing holding company systems. Subsection (b) dealt with integration and simplification orders by the Commission after hearings. Subsection (c) authorized the Commission to apply to a federal court for enforcement of its 11(b) orders, permitted the court to take exclusive jurisdiction of the company assets and made it the duty of the court to appoint the Commission as sole trustee and empowered the Commission, with the approval of the court and subject to terms and conditions prescribed by the court, to dispose thereof in accordance with a reorganization plan approved by the Commission after hearing (prepared in the first instance by the Commission or subject to its rules by any *bona fide* interested person). Subsection (d) authorized the Commission to *institute* proceedings for reorganiza-

[Footnote continued on following page.]

support in the analysis of this section of the original bill.[33] After hearings before both the House and Senate committees, the bill was rewritten and a substitute bill introduced (S. 2796). Title I[34] of the Senate version of the substitute bill,[35] which eventually became known as the Public Utility Holding Company Act, added to section 11 the provision for voluntary readjustment, which was apparently patterned after section 77 of the Bankruptcy Act.[36]

The renumbered subsections (d)[37] and (f) of section 11 of the substitute bill, formerly subsections (c) and (d), remained substantially unchanged. The new subsection (e) contained provision for the mandatory appointment of the Commission as trustee, similar to that in subsections (d) and (f) and for like authority in the court and Commission as under subsec-

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[Footnote continued from preceding page.]

tion under section 77B for any insolvent registered company and required the appointment of the Commission as sole trustee in any such proceeding or otherwise and made the reorganization plan effective only upon the approval by the Commission after hearing and prior to submission to the court (such plan to be prepared in the first instance by the Commission or subject to its rules by any *bona fide* interested party) and subjected the payment of all fees to Commission approval.

Subsections (c) and (d) of S. 1725, which are set forth in Appendix "B", later became subsections (d) and (f) respectively, of the substitute bill, S. 2796 (74th Cong., 1st Sess.) and eventually of the Act.

[33] The analysis of subsections (c) and (d) have been excerpted from the report as contained in the Hearings before the Senate Committee on Interstate Commerce (74th Cong., 1st Sess.), p. 49 and included in Appendix "B" below.

[34] Title II of S. 2796, as did S. 1725, dealt with amendments to the Federal Water Power Act.

[35] The provisions of section 11(d), (e) and (f) of S. 2796 are printed in Appendix "C", *infra*, p. 173 ff.

[36] 79 Cong. Rec. 8845 (74th Cong., 1st Sess.) (Excerpts from the Congressional Debates are included in Appendix "D", *infra*, pp. 180-1).

[37] The phrase "fair and equitable" in reference to a reorganization plan was added to subsection (d).

tion (d), to approve and execute any plan,[38] but otherwise was substantially the same as the finally enacted subsection. This new provision was intended, according to the Senate Report, to provide the machinery for voluntary readjustments, which were "to be carried out under the Commission supervision".[39]

The Senate Report bears out the conclusion that the Commission under the substitute bill, as under the original bill, was to have the dominant role in the reorganization or simplification process and that in this connection subsections (d) and (e) provided alternative methods for readjusting *solvent* registered companies while subsection (f) contemplated the reorganization of *insolvent* ones.[40] It appears from the general introductory portion of the Senate Report on the substitute bill as originally introduced the remedy of divestment[41] was patterned after the "technique" established under the Sherman and Hepburn Acts, that the power of federal courts was to be used to "effect" both voluntary and involuntary readjustments and that "during all court processes" the Commission is "to act as an impartial expert economic adviser

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[38] The final sentence of subsection (e) of the substitute bill which was omitted from section 11(e) of the Act originally read as follows:

> "* * * It shall be within the authority of the court and the Commission to approve and carry out any plan under this subsection which it would be within their respective authority to approve and carry out under subsection (d) of this section." (Appendix "C", *infra*, p. 175.)

[39] See S. Rep. No. 621 (74th Cong., 1st Sess.), p. 8 (Appendix "C", *infra*, p. 177).

[40] S. Rep. No. 621 (74th Cong., 1st Sess.), p. 33 (Excerpt in Appendix "C", *infra*, pp. 178-9). The Senate Report on the substitute bill follows closely the analysis made as to these provisions in the Report on the original bill.

[41] *North American Company* v. *S. E. C.*, 327 U. S. 686, 707 (1946).

and administrative assistant."[42] These broad preliminary comments must be viewed in their proper perspective within the Senate Report and in the light of the *original provisions of the substitute bill*, and consequently must be read consistently and in a reasonable fashion with the Senate Committee's subsequent detailed statements in its sectional analysis.[43] The sectional analysis, which should by its very nature be certainly controlling, is more explicit as to the relationship of the court and Commission. From that analysis it appears that the Commission possesses the dominant role during the reorganization process both in the formulation and approval of the plan and its participation in the execution as trustee, while the introductory remarks, of general nature, merely refer broadly to the technique used and the court's power to carry out readjustments and the function of the Commission *during* the court process. In this latter connection, it is significant that the statement as to the status of the Commission follows the discussion of compulsory readjustments, covered in 11(d) so that at the very least its implications should be determined by a consideration of the provisions of subsection (d) as well as (e). Furthermore, the reference to the status of the Commission "during all court processes" appears to relate to the secondary function as mandatory trustee, assigned to the Commission under the original provisions of the substitute bill. As both subsections (d) and (e) at the time of the Senate Report provided for the mandatory appointment of the Commission as trustee in connection with the execution of the plan, it would seem that the Commission was intended to be an active participant

[42] S. Rep. No. 621 (74th Cong., 1st Sess.), pp. 13-4 (Excerpt printed in Appendix "C", *infra*, pp. 177-8).

[43] S. Rep. No. 621 (74th Cong., 1st Sess.), p. 33 (Excerpt printed in Appendix "C", *infra*, pp. 178-9).

as administrator or trustee of the company's assets in the course of simplification during the court processes. Consequently, a reasonable and consistent explanation of both passages in the Senate Committee's Report negates any legislative intention that the district court function "as in an original equity proceeding, exercising all the powers and duties inherent in a court of equity" (R. 22) like a district court under the Sherman Act. On the contrary these passages affirmatively reveal the intention that the Commission take a dominant role in the reorganization process, and in any event to act in certain respects in cooperation with the courts.

The Congressional debates and administrative interpretation do not afford such unequivocal support for the view of the court below as to the nature of the section 11(e) court, as the court below indicates. Congressional debate, particularly in the Senate, centered upon the provisions of subsection (f) empowering the Commission to institute proceedings for reorganization of insolvent companies under section 77B of the Bankruptcy Act and making mandatory the Commission's appointment as trustee (both of which were changed by amendment).[44] It was urged that the mandatory duty to appoint the Commission as trustee be changed to give the court discretion in the matter as the court had customarily exercised such administrative function. In the course of debate, Senator Wheeler tried, although apparently unsuccessfully, to convince the Senate that the restriction of the court's power of appointment did not oust the court of jurisdiction "because the court has to approve the plan, even though the Commission approves it," pointing out in addition: "In other words, there is really a double check upon the plan, the final de-

[44] 79 Cong. Rec. 8443-4, 8844-5, 8936-41, 8943 (74th Cong., 1st Sess.)

termination rests as in the past in the courts."[44a] This language, by virtue of the analytical dissection by the court below of the words and phrases therein and the attribution thereto of hidden meanings, is found to evidence the Congressional intention to grant to the district court the "traditional function of a court of equity" (R. 23). The broad sweep of the language is lost by the surgical operation which overlooks the extemporaneous nature of Senator Wheeler's remarks made on the floor of the Senate in the course of debate and consequently subjects them inappropriately to an elaborate analysis requiring the same degree of exactitude that may be justifiably applicable to the provisions of a carefully drafted statute.[45] Obviously the significance of the quoted statement can be completely altered by a shift in the stress upon the words in the sentence. Moreover, it should be noted that even where a court in passing upon administrative action performs its duty on the basis of the doctrine of substantial evidence and administrative finality, the "final determination"[46] rests in the courts, and that the phrase "as in the past" could

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[44a] 79 Cong. Rec. 8845, 74th Cong., 1st Sess. (Excerpt printed in Appendix "D", *infra*, pp. 180-1.)

[45] Apparently the difficulties of construction are doubled because of the need to interpret not only the provisions of Section 11(e), but also the language in the Congressional debates and reports. Hence doubly appropriate are the remarks of Mr. Justice Frankfurter in *Palmer* v. *Massachusetts*, 308 U. S. 79, 83 (1939), when he cautioned:

> "* * * And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. * * *"

[46] See discussion of "substantial evidence" rule as incorporated in Administrative Procedure Act, *infra*, p. 92, n. 120.

certainly as easily refer to "past" status of the court under "past" administrative law without harking back to historic origins of the court of equity. In plain language without emphasis upon words and phrases and hidden meanings, Senator Wheeler was at the time attempting to assure the Senate that the limitation upon the court's power of appointment was not too significant as in any event the court had to approve the plan before it became effective and hence still operated, as formerly, as a final check upon the Commission. Besides, this meager discussion of the relation of the Commission to the court, which was only incidental to the debates on the mandatory appointment of the trustee under subsection (f), clearly discloses the limited extent of the Congressional consideration of subsections (d) and (e) and is certainly a slender basis upon which to find a Congressional intent to bestow the full traditional equity powers upon the district court under section 11(e). The amendment to provide for judicial discretion in the appointment of a trustee of course affected the secondary function of the Commission with respect to the execution of the plan during the court process, but left untouched its primary function in connection with the approval of the plan. The removal of this restriction upon the power of the 11(e) court did not of itself convert that court into a traditional court of equity.

The administrative interpretation upon which the court below placed its reliance is an inadequate ground for its conclusion. Here again the ambiguous remarks made by former officials of the Commission at recent hearings and equivocal statements appearing in the Commission's Tenth Annual Report to Congress (R. 23-4), provide at best a tenuous support for the conception by the court below of the section

11(e) court as the traditional court of equity with all its powers. In contrast equally ambiguous statements appearing in the records of these same hearings[47] and in the same Annual Report [48] of the Commission characterize the district court as a review court. Accordingly, neither view can justifiably be deemed conclusive one way or the other.

A fair analysis of the entire legislative history, as presented above, which is apparently unaffected by administrative interpretation, discloses that subsections (d), (e) and (f) are interrelated and that the court thereunder is not solely a court of equity nor only a court of review.[49] It is not all white nor all black. It exercises both review and equity functions,

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[47] Mr. Milton H. Cohen, a former director of the Public Utilities Division of the S. E. C., on whose testimony the court below relied, stated at the same hearing: "The Commission's judgments, of course, are not final; as I pointed out, any plan is subject to *review by the United States district court* which must approve the plan as fair and equitable, and thereafter there is the right of appeal to the United States circuit court of appeals, and in appropriate cases review may be sought in the United States Supreme Court." (Italics ours.) Hearings Before the Securities Subcommittee of the House Committee on Interstate and Foreign Commerce, 79th Cong., 2nd Sess., Part 3, p. 963.

[48] Tenth Annual Report to Congress of the Securities and Exchange Commission, p. 87: "Once proceedings under Section 11 are instituted by the Commission (*or are initiated by the filing of a voluntary plan*), *full hearings* are held in which all interested parties are given the opportunity to present evidence and voice their views before the Commission. *On the basis of the record* before it and the contentions made as to the applicability of the law to the facts, the Commission issues its findings and opinion and order. All such orders are subject to full *judicial review* in the Federal courts." (Italics ours.)

[49] As Mr. Justice Douglas in *Estin* v. *Estin*, 334 U. S. 541, 545 (1948), so aptly said in another connection:

> "* * * But there are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodations between conflicting interests. This is why most legal problems end as questions of degree."

under section 11(d), (e) and (f), and must work cooperatively with the Commission in the simplification or reorganization process. The function of the Commission and the court complement each other, and do not operate independently of each other.

2. Internal evidence in the Act.

The language of section 11(e) was also read by the court below through "the distorting lenses of inapplicable judicial doctrine". Various inconsistencies and absurdities and the distortion of the statutory scheme result from the conclusion, based on the phraseology of section 11(e), that Congress intended to require "the district courts in Section 11(e) proceedings to exercise in connection with the approval or disapproval of a plan the traditional powers of a court of equity in deciding that justiciable issue" (R. 25). The major items of internal evidence in the Act upon which the court below relied will be considered *seriatim* below and demonstrated to be an erroneous, insufficient or unmeritorious basis for the conclusion of the court below respecting the function of a section 11(e) court.

(a) Subsection (e) which the court below apparently analyzed in isolation[50] from the related subsections (d) and (f) of section 11 provides in part as follows:

> "* * * If * * * the Commission shall *find* such plan * * * [necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan], the Commission shall make an order approving such plan * * *. If * * * the court [* * *] shall *approve* such plan

[50] Cf. *American Power and Light Co. v. S. E. C.*, 329 U. S. 90, 104 (1946).

as fair and equitable and as appropriate to effectuate the provisions of section 11], the court as a court of equity may * * * take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; * * *." (Italics ours.) (Brackets added).

The similarity in the bracketed portion of the quoted language respecting the duties of the court and Commission is deemed by the court below to disclose a Congressional intent to impose the same duty upon both the court and Commission in determining *de novo* the fairness of a plan. However, it should be noted that even from a technical or grammatical approach, the same words are not used to describe the respective functions (as claimed by the court below) since the Commission is required to "find" while the court is to "approve". The word "find" arguably may imply the *de novo* determination of the facts, while the word "approve" seems to mean confirm or ratify—something in the nature of a review function as distinguished from a *de novo* determination. Furthermore, the sequence of events whereby approval is followed by enforcement seems to suggest the operation of the equity power *after* approval. On the other hand, it may be fairly inferred that the language imposed the duty on the court to determine compliance with the statutory standards (appropriateness and fairness), and incidental therewith to examine the Commission's findings for support by substantial evidence. Such construction of the language would establish comprehensive dichotomy (consistent with the legislative history and the trend of the law) whereby the Commission makes findings of facts as to the fairness of the plan and the district court examines the record, to ascertain the existence of substantial foundation therein for such findings and to determine

compliance of the administrative action with the statutory standards. Thus similar language in section 77 of the Bankruptcy Act, after which section 11(e) was patterned, has been construed to authorize a review function in an analogous situation.[51] Moreover, in view of the intertwining[52] of the terms "fair and equitable" with the phrase "appropriate to effecuate the provisions of Section 11" in defining the duty of the court under subsection (e) it is likely that Congress intended the same type of examination by the district court with respect to the Commission's determinations both as to fairness and equity and appropriateness to effectuate provisions of section 11(b).[53] Accordingly, since the Commission's findings relating to "appropriateness" are entitled to the greatest weight[54] and are tested primarily for warrant in law and justification in fact[55] and not on a *de novo* basis by a section 11(e) court, the same test or standard must be applied by that court to the Commission's decision as to fairness and equity.

Nor are "dissonant meanings" ascribed to the basic statutory standards of "fairness" and "appropriateness" as implied by the court below, since the section 11(e) plan must always measure up to these standards when examined by both the Commission and the district court. In this way the statutory standards re-

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[51] See *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448 (1943) (discussed *infra*, p. 83 *et seq.*).

[52] The same nexus between these two statutory standards is implicit under subsection (d), which provides for district court enforcement of an 11(b) order and the disposition of assets in accordance with a fair and equitable reorganization plan.

[53] Subsection (b) expressly provides for review of its orders under section 24, under which the Commission's 11(b) findings are conclusive if supported by substantial evidence.

[54] *In re Standard Gas & Electric Co.*, 151 F. (2d) 326, 331 (C. C. A. 3, 1945).

[55] *American Power and Light Co.* v. *S. E. C.*, 329 U. S. 90, 112-113 (1946).

ceive the same treatment throughout the subsection, while the function of the district court and the Commission differ primarily in respect to the extent of judicial re-examination of the Commission's determination. Moreover, it is not contended, as the court below implies, that the "district courts of the United States should exercise *only* the function of review" (R. 24-5). (Italics ours.) Rather was it intended that the section 11(e) court exercise the powers of both a court of review and a court of equity, depending upon the issue at stake at the time.[36] The comment of the court below that "more appropriate language could be employed" if a review function had been intended cuts both ways. It can equally be argued that "more appropriate language could be employed" if a *de novo* determination before the district court had been intended.[37]

In this connection the court below also rhetorically questions "why then, must it not be concluded that it was the Congressional intention that the district courts", like the Commission should "exercise an independent and plenary judgment in passing on the fairness and equity of the plan" (R. 25). The answer is that such conclusion is not supported by legislative history and the language of the Act and runs directly counter to Congressional intention, as evidenced in its enactments for the past quarter of

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[36] The court's powers, like its decrees, may be divisible in nature and partake of functions in different categories, such as review or *de novo*. Cf. *Estin* v. *Estin*, 334 U. S. 541, 545 (1948) (Concept of divisible divorce). Recognition thereof necessarily flows from the superimposition of the administrative agency upon the judicial hierarchy, requiring an accommodation of the latter to the former, somewhat analogous to the accommodation of the independent sovereign states to the full faith and credit clause of the Constitution.

[37] The Commission's determination could have easily been made "advisory" as under section 172 of the Bankruptcy Act (11 U. S. C., sec. 572).

a century, in establishing administrative agencies whose findings are treated as conclusive if supported by substantial evidence and are not subject to *de novo* determination by the courts.[38]

(b) The court below also discovers a "Congressional intention" to require independent, *de novo* reexamination of the fairness of a plan from the following language contained in subsection (e):

> "* * * If * * * the court * * * shall approve such plan * * *, the court as a *court of equity* may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; * * *" (Italics ours.)

The reference to the phrase "court of equity" it should be noted, is made in connection with the grant of "exclusive jurisdiction of the company and its assets wherever located" and would seem to reveal a Congressional intent to vest sole or exclusive control of the company or its assets in a particular court (so as to avoid any jurisdictional dispute) and at the same time to establish the geographical limits of that control. This analysis is not only borne out but is even further clarified by the use of almost identical phraseology in the interrelated subsection (d),[39] in a context completely divorced from any question of court approval or disapproval. From a consideration of both subsections (d) and (e), it would seem that the

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[38] *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142 ff. (1940); see Cushman, *The Independent Regulatory Commissions* (1941) pp. 474-5.

[39] Subsection (d) provides in part as follows: "* * * In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; * * *"

court was to exercise its equity powers in reference to situations outside the zone in which both the Commission and the court are to cooperate by virtue of statutory provision. Thus the section 11(e) court may exercise its equity power to protect its present, future and reserved jurisdiction by injunction.[60] While the powers of the section 11(e) court (except for a possible conflict of jurisdiction[61]) are broad in its relation with other courts, its powers are affirmatively limited in its relation with the Commission, as evidenced by the provisions for the Commission's prior approval of a plan, approval of fees, etc.[62] It is obvious that unlimited power has not been granted to the section 11(e) court.

(c) The court below also refers to the inclusion in section 11(b) of the language that "any order made under this subsection shall be subject to judicial review as provided in section 24". Admittedly these words are "apt for creating a review function", but it is also highly significant that no other subsection or section of the entire Act contains a similar reference, and yet the review of Commission action under many different sections is made nevertheless pursuant to section 24(a), including various phases of the simplification program. Consequently its absence from section 11(e) is no more significant than its omission everywhere else in the Act. It is interesting to note that the provisions of section 11(b) of

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[60] *Okin* v. *S. E. C.*, 161 F. (2d) 978 (C. C. A. 2, 1947); *In re Standard Power & Light Corp.*, 48 F. Supp. 716 (D. Del., 1943); *Illinois Iowa Power Co.* v. *North American Light & Pow. Cos.* 49 F. Supp. 276 (D. Del., 1943); *In re American Gas & Power Co.*, 55 F. Supp. 756, 761 (D. Del., 1944).

[61] For discussion of overlapping area of jurisdiction between district court under section 11(e) and court of appeals under section 24(a) see *infra*, p. 70.

[62] The powers of the Commission are further considered *infra*, pp. 61-3.

the original and substitute bills, as introduced, do not refer to review under section 24(a), nor do the Senate and House Committee Reports make any comment thereon. On the other hand, the Congressional debates disclose discussion of the vulnerability of section 11(b) orders on the theory of the *Schechter* case, in the absence of any judicial review and mention the reviewability of all orders under section 24(a).[63] Conceivably this explicit reference in section 11(b) to section 24(a) was included in the course of Congressional consideration to eliminate any doubt as to the reviewability of the Commission's 11(b) orders especially since the provisions of section 11(b) (commonly known as the "death sentence" clause) caused a great deal of public furor. The danger of such singling out for special treatment is clearly made apparent in the instant case since the general coverage of the broad language of section 24(a) is thereby rendered ambiguous and may be limited, in an unintended fashion, by a mechanical application of the doctrine of *inclusio unius exclusio alterius*.[64] This principle of statutory construction which is of course to be applied only in the absence of legislative intention should never be used to defeat any clear expression of such intention and accordingly yields in the instant case, in the face of

[63] 79 Cong. Rec. 8946-7 (74th Cong., 1st Sess.).

[64] A similar situation recently arose in connection with the hearings of 1946 on proposed amendments to the Act, one of which was to amend section 11(e) so as to add an express provision for a stay. It was quickly pointed out at the hearing in this connection that section 24(b) contained a general provision for a stay and that the inclusion, by amendment of an express provision for a stay in section 11(e) might be construed to imply its exclusion from all other portions of the statute and so operate to limit the coverage under section 24(b). Hearings Before Securities Subcommittee of House Committee on Interstate and Foreign Commerce (79th Cong., 2nd Sess., pp. 1089-94). Apparently the proposed amendment was never adopted.

the evidence of intention in the Congressional debates[65] to make all final orders of the Commission, and not merely 11(b) orders, reviewable under section 24(a). Hence the observation of the court below as to the reference in section 11(k) to section 24(a), although "interesting", affords no proper basis for determining the scope of section 24(a) nor for its conclusion as to the function of the section 11(e) court.

The absence, moreover, from section 11(e) of the sentence or its equivalent which makes the findings of the Commission as to facts conclusive, if supported by substantial evidence, is not as notable as the court below states. The omission of this sentence does not preclude a section 11(e) court from sustaining the Commission's findings of appropriateness with substantial foundation in the record, as indicated above. Besides, there are many analogous situations in which the doctrine of substantial evidence has been applied without the magical sentence[66] (as will be shown below). This principle has been evolved by recognition of the realities of the situation—the creation of an expert administrative body acting as a trier of the facts and fastens itself upon the relationship between

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[65] The following colloquy occurred between Senators Wheeler and Borah when the latter inquired as to the appealability of 11(b) orders. [79 Cong. Rec. 8946 (74th Cong., 1st Sess.)]:

"Mr. Wheeler: Yes. Every order which is made by the Commission is appealable to the courts.

"Mr. Borah: That is covered by what section?

"Mr. Wheeler: Section 24(a), line 16, page 83, which reads as follows: * * *

"Mr. Borah: In other words all these orders which would be made with reference to reorganization and so forth would be appealable to the courts?

"Mr. Wheeler: Absolutely."

[66] See cases cited, *infra*, p. 91, n. 117.

the court and the agency as a means for allocating their respective responsibilities.

(d) The use of the phrase "after notice and opportunity for hearing" in section 11(e) is stretched by the court below to signify "the manifest intention of Congress to give all persons who might be affected by the plan a day in court in an equity proceeding" (R. 26). It is difficult to see just how that particular phrase conjures up a "manifest intention" to provide affected parties with "a day in court in an equity proceeding". Strangely enough, that same special significance is not attributed by the court below to the identical phrase appearing in section 11(e) in connection with the proceedings before the Commission. Nor for that matter does the identical requirement of notice and an opportunity for hearing in section 11(b) give rise to any unusual consequence or interpretation. Likewise the logic of the court's analysis when applied to section 11(d) leads to the absurd conclusion that "a day in court in an equity proceeding" is *not* intended to be available to parties affected in section 11(d) enforcement proceedings in view of the absence therefrom of any express provision for notice and hearing before the district court. Such construction would obviously result in a ridiculous situation whereby the two enforcement courts under sections 11(d) and (e) respectively would function differently and possess a different status on the same issue. Such a consequence would be at variance with the legislative history which evidences the interrelationship between these two enforcement courts. Clearly the provision for notice and opportunity for hearing must be implied in section 11(d) for the sake of consistency with section 11(e) and therefore its presence or absence is not necessarily conclusive as to the nature of

the court hearing. Moreover, any innuendo in the quoted phraseology that only an equity proceeding can properly protect the rights of affected parties is unwarranted. In fact, Congress could have completely ousted the district court of jurisdiction and constitutionally lodged sole responsibility for the supervision of the entire simplification process with the Commission, subject to review by the appellate courts.[67] In any event, the courts do not have the sole burden of carrying out the Act as the Commission has been entrusted with a share of that responsibility. Under such circumstances and particularly since all plans must be approved by the Commission while all need not necessarily be the subject of enforcement by the section 11(e) courts, one may question the accuracy of the court's statement that "Many, if not most, of these persons [affected by the plan] will not have appeared before the Commission" (R. 26). No factual or documentary support is furnished for the gratuitous statement made by the court below. Contrariwise, the reverse is more apt to be true, namely, that most of the persons affected by the plan will have appeared before the Commission.[68]

(e) Time and again, as has been indicated, the court below ascertains Congressional intention respecting the function of a section 11(e) court on the basis of unwarranted inferences drawn from insupportable or erroneous premises. This approach is again exemplified by the tenuous and disputable inferences of

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[67] Such provision for notice and hearing, although present in section 77 of the Bankruptcy Act, has not prevented the district courts from exercising limited review functions on certain issues. See *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448 (1943).

[68] Other equally questionable statements of the court below respecting the receipt of evidence *aliunde* the Commission's record will be discussed, *infra*, at p. 73 *et seq.*

Congressional intention not to limit the district court to a review function, which the court below draws from the absence of a statutory provision for a vote upon a proposed plan. In the language of the court below:

> "It seems improbable to us that Congress intended that the district courts of the United States should be limited to the function of mere review under the Public Utility Holding Company Act, the only Federal reorganization statute by the terms of which security holders are not permitted to vote their approval or disapproval of a proposed plan or reorganization, *and to prevent its operation if the holders of the requisite amounts of the securities affected are not in favor of it*" (R. 26-27). (Italics ours.)

It is apparent that the court below postulates as its basic premise, upon which its inference is based, that all federal reorganization statutes except the Public Utility Holding Company Act permit security holders to vote upon a proposed plan and to prevent its operation by their dissent or veto.

The main thrust of this statement by the court below which is italicized in the quotation, *supra*, relates to the supposed power of dissenting security holders to veto any reorganization plan, and so act as an additional check. That major premise, upon which the court below relied, is erroneous; therefore the inference drawn therefrom respecting the Congressional intention not to limit the district court to a review function is also fallacious. Reference to the Bankruptcy Act discloses that express provision has existed since the adoption of an amendment in 1935[69] to sec-

[69] Act of Aug. 27, 1935, c. 774, 49 Stat. 911, 11 U. S. C. sec. 205.

tion 77 for overriding the vote of dissenters and for authorizing confirmation of a plan despite their rejection, provided in substance that the dissenters receive fair and equitable treatment and are not reasonably justified in their rejection.[70] These "cram down" provisions[71] which permit confirmation by the courts over objection of security holders were recently held within the bankruptcy powers of Congress. *R. F. C.* v. *Denver & Rio G. W. R. Co.*, 328 U. S. 495, 533 (1946). Thus the voting requirement has been relegated to relative insignificance and a mere token existence, at least in railroad reorganizations under section 77 of the Bankruptcy Act, since fair and equitable treatment of dissenters will usually render their rejection without reasonable justification. As

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[70] Section 77(e) of the Bankruptcy Act [11 U. S. C. §205(e)] provides in pertinent part as follows:

> "Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e):* * * *" (Italics ours.)

[71] Craven and Fuller, *The 1935 Amendments of the Railroad Bankruptcy Law*, 49 Harv. L. Rev. 1254 (1936).

stated by this court in *R. F. C.* v. *Denver & Rio G. W. R. Co.*, *supra*:

> "* * * If there is a rejection, there is a reexamination of the plan to assure that those who dissent have had fair and equitable treatment. Apparently the reexamination for this treatment does not differ from that for the original court approval under the first paragraph of subsection (e). It does, however, center upon the rights of those who rejected the plan.
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> "* * * If a plan gives fair and equitable treatment to dissenters the elements which make the plan fair and equitable cannot be the basis for a reasonably justified rejection. If only those elements are relied upon, as here, the rejection is not reasonably justified." (328 U. S. 534, 535).

Accordingly, the voting requirement is presently yielding to an expanding concept of the bankruptcy power under the Constitution. In any event, no vote is required where an overriding statutory policy compels the reorganization or readjustment, as under the Sherman and Hepburn Acts. E. g., *Continental Ins. Co.* v. *U. S.*, 259 U. S. 156 (1922). Strangely enough, this precedent is completely disregarded by the court below, although it provided the basic authority for the compulsory and voluntary readjustment provisions of the Act.[72] It may reasonably be concluded in the light of the legislative history and, by analogy to the precedents under the Sherman and Hepburn Acts, that the overriding policy of the Act is the basis of the omission of the voting requirement, particularly

[72] It is of interest to note that the precedents under the Sherman and Hepburn Acts are the bases for the Senate Committee's statement as to the court's power to effect readjustments, upon which the court below relies in an earlier portion of its opinion.

in view of the statutory interpolation in the reorganization process of an expert body, as the Commission, charged with the duty of protecting the rights of investors as well as the public interest. Yet, even if the precedents under the Sherman and Hepburn Acts are not fully decisive, the persuasive analogy of the 1935 amendments to section 77 of the Bankruptcy Act negates the importance of the voting requirement, and renders unwarranted any inference of Congressional intention respecting the function of the district court on the basis of the absence of a veto power of the security holders.

3. Law of reorganizations.

The court below also makes the broad claim that "The history of the law of reorganizations tends to support the view that a Section 11(e) court must function as an equity reorganization tribunal" (R. 27). This claim is not borne out by the precedents in the law of reorganization.

(a) *Precedents under section 77 of the Bankruptcy Act.*

This general conceptualistic approach places primary emphasis upon the historical origins of the reorganization process, and overlooks the recent developments in the law of railroad reorganization under the Bankruptcy Act and the current trends in the field of administrative law. The legislative history discloses that the provisions of section 11 pertaining to the relation of the district court and Commission, in the simplification or reorganization process, were patterned after the provisions of section 77 of the Bankruptcy Act (as distinguished from 77B or Chapter X) affecting the relation of the

Interstate Commerce Commission and the court. This view is reinforced upon examination of the comparable provisions of these two sections.[73] It is recognized that the district courts have definite responsibilities under section 77 of the Bankruptcy Act, and likewise definite limitations upon their action. The status of the district courts under section 77 of the Bankruptcy Act would certainly seem exaggerated, at least by innuendo, in the statement of the court below that "Congress intended the district courts of the United States, within the limitations of the statute, to function as equity reorganization courts." (R. 29). This overstatement of the district courts' position cannot be reconciled with the views of this Court in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 468 (1943), expressed as follows:

> "* * * Congress outlined the course reorganization is to follow. It established standards for administration and placed in the hands of the Commission the primary responsibility for the development of a suitable plan. *When examined to learn the purpose of its enactment, § 77 manifests the intention of Congress to place reorganization under the leadership of the Commission, subject to a degree of participation by the court.*
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> "It is clear from the discussions and the statute itself that there was recognition by everyone of the advantages of utilizing the facilities of the Commission for investigation into the many sided problems of transportation service, finance and public interest involved in even minor railroad reorganizations and utilizing the Commission's experience in these fields for the appraisals of values and the development of a plan of re-

[73] The parallel is not unexpected since the railroads and utilities have long been subjected to regulation as industries affected with the "public interest".

organization, fair to the public, creditors and stockholders. *The resulting legislation was an attempted balance between the power of the Commission and that of the court.*" (Footnotes omitted.) (Italics ours.)

Later in the same case, after discussing the limited powers of the district court with respect to issues of valuation and compatibility with public interest, this Court concluded as follows:

> "*Thus limited the district court acts concerning the plans only upon the issues specifically delegated by subsection (e). As to these, its powers are negative. It may veto the plan in its entirety but may improve it only by suggestion.* It becomes a necessary and important factor in railroad reorganization. These reorganizations may be attained only through properly coordinated action between the Commission and the court" (318 U. S. 474-5). (Italics ours.)

Thus this Court analyzes the powers of the section 77 court as negative and not affirmative at least in relation to the Interstate Commerce Commission, contrary to the court below.

Equally questionable is the further statement of the court below with respect to the function of the section 77 court vis-a-vis the Interstate Commerce Commission, on the issue of value, to the following effect:

> "* * * Though the Commission must make the primary determinations respecting the plan, including in particular those relating to valuations of railroad securities, the court must exercise its own independent judgment in approving or disapproving the plan *whether the court's rulings relate to value or to some other pertinent subject.* See *In re Erie R. Co.*, 37 F. Supp. 237, 243-5,

aff'd, 6 Cir. 133 F. 2d 730, cert. den. 320 U. S. 748" (R. 29).

The reliance by the court below upon the *Erie* case, *supra*, is misplaced for the District Court in that case clearly recognizes the limitation upon the scope of its review on a question of value when it states:

> "* * * it is my opinion that the Commission's determination of the value of the properties of the Erie and the Chicago & Erie for reorganization purposes—i. e. the total capitalization—is conclusive unless it clearly appears (1) that the Commission applied improper standards of valuation, or (2) that its finding is wholly unsupported by the evidence (citations omitted) * * *" (37 F. Supp. 244).

In any event the italicized portion of the statement (R. 29, *supra*) by the court below does not square with the views expressed as follows by this Court in the *Ecker* case, *supra*:

> "The power of the court does not extend to participation in all responsibilities of the Commission. Valuation is a function limited to the Commission, without the necessity of approval by the court. * * *
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> * * * *
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> "* * * Congress apparently intended to leave the determination of valuation 'of any property for any purpose under this section' to the Commission. The language chosen leaves to the Commission, we think, the determination of value without the necessity of a reexamination by the court, when that determination is reached with material evidence to support the conclusion and in accordance with legal standards" (footnotes omitted) (318 U. S. 472-3).

Thus this Court clearly indicates that "judicial review does not contemplate an independent examination into valuation" by the bankruptcy court under section 77, stating that "valuation is essentially a problem for the [Interstate Commerce] Commission". Likewise the intimations of this Court are to the effect that the scope of review may be wider with respect to issues other than valuation (e. g., exclusion of claimants for lack of value), but does not contemplate an independent *de novo* determination by the district court. Certainly the description by this Court of the functions of the section 77 court cannot be reconciled with the concept of that court, as envisaged by the court below. Accordingly, the expressions of this Court in the *Ecker* and other cases[74] make it impossible to accept the conclusion of the court below with respect to the relation of the Interstate Commerce Commission and the district court under section 77 of the Bankruptcy Act that "the limitations imposed by the statute are *largely procedural,* operative in the respective fields specified by Congress to Commission and court, and *do not substantially circumscribe the general equity jurisdiction of the reorganization tribunal*" (R. 29). (Italics ours.) Therefore, as the premise of the court below respecting the function of a section 77 court, is erroneous, its inference based thereon pertaining to the function of the section 11(e) court must neeessarily be fallacious.

(b) *Section 77B and Chapter X are not analogous.*

The reliance by the court below upon the analogy to and the precedents under, section 77B and Chapter X of the Bankruptcy Act for cloaking the section

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[74] *E. g., Palmer* v. *Massachusetts*, 308 U. S. 79 (1939); *Warren* v. *Palmer*, 310 U. S. 132 (1940). Also see concurring opinion in *Ecker* case, *supra*, 318 U. S. 512-13, 515.

11(e) court with the classical equity powers, has been misplaced. At the outset it must be pointed out that the provisions of section 77B of the Bankruptcy Act are substantially different from those of section 11(d), (e) or (f) of the Act, since the Commission, apart from section 11(f), exercised no functions, under section 77B and the 77B reorganizations were conducted wholly under the supervision and direction of the bankruptcy courts. Therefore, the situation under section 77B is not analogous and so provides no real guidance on the question of the function of the court vis-a-vis the Commission under section 11(e) of the Act.

Similarly, Chapter X (which is the successor to section 77B by virtue of the 1938 amendments to the Bankruptcy Act, known as the Chandler Act) affords no aid to the views espoused by the court below. Far different is the function of the Commission under Chapter X of the Bankruptcy Act than under section 11 of the Act. Its duties and powers under Chapter X are certainly more limited than under section 11. The Commission has itself described its restricted position under Chapter X in the following language:

> "In participating in proceedings under Chapter X of the Bankruptcy Act, the role of the Commission differs markedly from that under the other Acts which it administers. The Commission does not administer Chapter X. It does not initiate the proceedings, hold its own hearings, or adopt Rules and Regulations, but acts, as the representative of investors and as an aid to the Court, in a purely advisory capacity. It has no authority either to veto or to require the adoption of a plan of reorganization or to render a decision on any other issue in the proceeding. The facilities of its technical staff and its impartial recom-

mendations are placed at the services of the judge and the security holders, affording them the views of experts in a highly complex area of corporate law and finance."[75]

Thus, under Chapter X, the Commission upon the referral of a plan has the discretion to prepare a report which in any event is only "advisory". Regardless of the action or inaction of the Commission, the district court is required to determine the fairness of a plan. As there is no division of responsibility between the court and the Commission under Chapter X, the ultimate approval or disapproval of plans is left solely with the district court.

Accordingly, although the court under Chapter X may possess "the full and independent equity powers in the classical pattern of reorganization courts", it is here contended, that the significant dissimilarity between the reorganization provisions of Chapter X and those of section 11, renders inapplicable the analogy of a Chapter X court to the section 11(e) court.

This view as to the inapplicability of the Chapter X concept to determine the relation of court and Commission under section 11, is fortified by the implications of section 172 of Chapter X (11 U. S. C. sec. 572) which makes the Commission's report upon the referral of a plan, only advisory. This proviso relating to the status of the Commission's report under Chapter X, as the court below admits, may support the inference of Congressional intention that the Commission's report under section 11(d), (e) and (f) should be more than "advisory" to the district court

[75] Twelfth Annual Report of the Securities and Exchange Commission, June 30, 1946, pp. 81-2. Such administrative interpretation is entitled to weight by the courts.

in passing upon the fairness and equity of a plan.[76] That inference is strengthened by the express requirement under section 11, for the approval of a plan by the Commission, before its enforcement, which is not required by section 172 of the Bankruptcy Act.

At this point the impact of section 11(f) of the Act upon sections 172 and 174 of Chapter X (11 U. S. C. secs. 572, 574) sheds light upon the status of the court under section 11(e). Thus, it would seem from an examination of provisions of the two statutes that the mandatory requirements of submission to, hearing before, and approval for fairness by, the Commission before submission to the court, stem primarily from the provisions of section 11(f) rather than sections 172 and 174, as the court below seems to imply (R. 28). Such construction would accord with the legislative history of the Holding Company Act and the express provisions of section 11(f), which discloses a Congressional intention to achieve the overriding policy of the Act with respect to both solvent and insolvent registered companies. In effect, section 11(f) would seem to project the Commission into the reorganization of insolvent registered holding companies, whether under Section 77B or its successor, Chapter X, in substantially the same position that the Commission occupies with respect to the readjustment or simplification of solvent registered companies under sections 11(d) and (e). In other words, the status of the S. E. C. under section 11(f) when projected into Chapter X closely parallels that of the I. C. C. under section 77 of the Bankruptcy Act; as section 11(f) is in substance a miniature reor-

[76] R. 28. The Chandler Act, enacted three years after the Holding Company Act, does not evidence a Congressional intention to modify or repeal the provisions of section 11(f). Moreover, it is well settled that repeals by implication are not favored.

ganization statute. Such specific statute as the Holding Company Act, which clearly contemplated the exercise by the Commission of functions in connection with bankruptcy reorganizations of insolvent registered companies, should not be unduly restricted by the general and broad provisions of the Bankruptcy Act, which affect all types of insolvent business corporations. Possibly a consistent construction of the provisions of both acts may be achieved by carefully marking out the different areas of operation by the Commission in terms of the issue at stake—divestment or insolvency. In any event, the accommodation of section 11(f) to the provisions of the Bankruptcy Act must not be made at the expense of the Holding Company Act, and certainly not at the expense of any part of section 11(e). Therefore the views expressed in *In re Midland United Co.*, 58 F. Supp. 667 (D. Del. 1944), which reflect an unwarranted expansion of the Bankruptcy Act rather than the accommodation of, the two acts to each other, must be rejected to that extent. In that case, Judge Biggs, who wrote the opinion for the court below in the instant case, was then sitting as District Judge and was called upon to determine the functions of a district court under section 174 of the Bankruptcy Act in relation to the Commission's function under section 11(f) of the Holding Company Act. He noted the review restrictions contained in section 24(a) of the Holding Company Act, but refused to read them into section 174 of the Bankruptcy Act because the two acts were not in *pari materia*,[77] and expressed the view that the district court under section 174 must exercise its independent judgment in approving a plan. At least the converse should be equally true,

[77] 58 F. Supp. 683, n. 15.

namely that the interpretation placed upon section 174 of the Bankruptcy Act should not be read into section 11(f), and certainly not into section 11(e), of the Holding Company Act. Consequently the *Midland* case in effect represents an unwarranted intrusion of Chapter X of the Bankruptcy Act upon the Commission's function under section 11(f), which the court below now seeks to extend to the Commission's function under section 11(e). Such extension would result in a distortion of the statutory scheme.

In this manner the court below has attempted to pull itself up by its own boot-straps, compound its own erroneous interpretation, and extend unduly the effect thereof. This is but another instance in which the court below has applied unreasonably and mechanically its views as to the classical court of equity to the overlapping provisions of the Holding Company and Bankruptcy Acts.

The status of the Commission under section 11 of the Holding Company Act, as indicated above, provides a striking contrast with its position under Chapter X, and is even more dignified, in certain respects, than that of the ICC under section 77. Thus, while under both section 77 and Chapter X of the Bankruptcy Act the proceeding originates in the district court, the proceedings under the Act, except for insolvency situations within the coverage of section 11(f) which should be accommodated to the provisions of the Bankruptcy Act, are instituted by the Commission and heard, if at all, by the district court upon the administrative record. The Act expressly provides for public hearings before the Commission and the maintenance of appropriate records thereof.[78] On the substantive aspect no plan under

[78] Section 19 of the Act, 15 U. S. C., §79(s) (Appendix "A" *infra*, pp. 166-7).

the provisions of section 11(d), (e) and (f) can become effective without the approval of the Commission after an opportunity for hearing and prior to submission to the court. Under subsection (e) a registered holding company may, subject to the rules and regulations of the Commission, propose the plan, while under subsections (d) and (f) a reorganization plan may be proposed in the first instance by the Commission or subject to its rules and regulations, by a *bona fide* interested party. In connection with the appointment of a trusteee or a receiver under section 11(d), (e) and (f) it appears that the Commission is to be notified and given an opportunity to be heard before the appointment of such trustee or receiver, and cannot be so appointed without its "express consent". Lastly, the Commission may, in accordance with its rules and regulations, require all fees paid in connection with "any reorganization, dissolution, liquidation, bankruptcy or receivership, in such proceeding" to be "subject to approval by the Commission".

The foregoing provisions of the Act establish at one and the same time the restrictions upon the usual powers of a court of equity and the division of function between the court and the Commission under section 11 of the Act. Thus Congress has assigned definite responsibilities to the district court and likewise made a very broad grant of power to the Commission.[79] The whole scheme of Section 11 leaves no doubt that Congress did not mean to grant to the district court the same scope that it may have historically had as a court of equity. In view of the legislative history of section 11 and the extent to which section 11 made judicial action dependent upon

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[79] *In re Standard Gas & Electric Co.*, 151 F. (2d) 326, 331 (C. C. A. 3, 1945).

approval by the Commission, it would violate the traditional respect of Congress for the administrative processes to imply the power, in a district court, to ignore determinations of value and fairness, by the administrative agency that has received a broad grant of power in the premises. Congress appears to have intended that the judicial functions of the section 11(e) court and the administrative functions of the Commission work cooperatively in simplifications.[80] Accordingly, the district court must not be permitted to exercise its powers independently of the Commission's action and thereby to impinge upon the function of the Commission.

The foregoing analysis discloses that the court below has been viewing the section 11(e) court through the distorting lenses of the inapplicable concept of the traditional court of equity. The legislative history, the provisions of the Act and the law of reorganizations do not support the determination of the court below, except if reviewed in the light of the predilection of the court below for the inapplicable judicial doctrine of the traditional court of equity and apparently an overwhelming desire to protect the judicial power. Such wholesale transplantation of that concept by the court below, which plays havoc with the statutory scheme of section 11, may be attributed to its failure to observe the admonition of this Court in *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142-144 (1940), when, in commenting upon the relation between court and agency under another federal statute, it stated as follows:

> "Courts, like other organisms, represent an interplay of form and function. The history of Anglo-American courts and the more or less nar-

[80] Cf. *Warren* v. *Palmer*, 310 U. S. 132, 138 (1940).

rowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from those. *To a large degree they have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process.* That this movement was natural and its extension inevitable, was a quarter century ago the opinion of eminent spokesmen of the law. *Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims*—modes whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services. *These differences in origin and function preclude wholesale transplantation of the rules* of procedure, trial and *review* which have evolved from the history and experience of courts. * * *" (Italics ours.)

Due regard for the proper distribution made by Congress of legal authority as between two law-enforcing agencies of government, the administrative

and judicial, is required.[81] Each has been entrusted with its share of the responsibility for carrying out the Act. The section 11(e) court and the Commission are not totally independent and unrelated instrumentalities, but exercise roles complementary to each other and can achieve the objectives of the Act only through cooperative action.[82] That analysis, despite the contrary views of the court below, stems from the language of section 11 of the Act, and is fortified by its legislative history and analogous precedents in the law of reorganizations. Moreover, if the respective roles of the Commission and the section 11(e) court have not been sharply defined in every detail by Congress and must be spelled out by the judicial process, extreme care must be exercised lest in the course of the delineation the respective functions of the Commission and court become confused and distorted. The court below interpolated its notions of policy in the interstices of the legislative provisions and upset the statutory scheme because of a jealous predilection for the judicial role, in complete disregard of the legislative division of functions between the Commission and the section 11(e) court.

The cooperative action envisaged entails a recognition of the proper relation of the court to the Commission and requires the judicial function to be performed in the light of, and with due regard for, the administrative action. By no means does such view contemplate a *de novo* judicial determination and a disregard of the Commission's action. Rather, the scope of the district court's function is to re-examine, on the basis of the administrative record the Commis-

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[81] *Columbia Broadcasting System* v. *U. S.*, 316 U. S. 407, 441 (1942).

[82] *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142 (1940).

sion's determination of value and fairness to see that it has warrant in the record and in the law. That conclusion, as will be demonstrated below, accords with the correct analysis of interrelated sections of the statute and is supported by a preponderance of the decisions on this question.

B. The District Court's *De Novo* Approval of an 11(e) Plan Is Not a Prerequisite to Its Consummation.

It has been pointed out above that the functions of the 11(e) court are limited by the terms of the statute. Especially significant in this connection is the fact that there is no requirement under the Act for the approval in all instances of the district court prior to the consummation of the plan, while express provision makes mandatory the approval of the *Commission* in every case before a plan can become effective [subsections (d); (e) and (f)]. Such prior approval of the Commission is necessary whether the proceeding originates with the Commission [under 11(d) or (e)] or with the bankruptcy court as contemplated under 11(f) (closely analogous to a railroad reorganization under section 77 of the Bankruptcy Act). Therefore recourse to the district court is had under section 11(e) *only* if the company *in its discretion* requests such action. In fact, *there may never be any approval, but the Commission's. Commonwealth and Southern Corp.* v. *S. E. C.*, 134 F. (2d) 747, 751 (C. C. A. 3, 1943); *Phillips* v. *S. E. C.*, 153 F. (2d) 27, 29-30 (C. C. A. 2, 1946), cert. den. 328 U. S. 860 (1946). Thus, in the *Commonwealth* case, *supra*, the statement was made:

> "* * * If the plan is one which can be carried out by the sole action of the parties thereto no further proceedings are needed."

Similarly, in the *Phillips* case, *supra*, the Second Circuit pointed out:

> "* * * And in the face of the very clearly permissive wording of the statute, we are not disposed to strain for an interpretation of the statute which will force unneeded enforcement proceedings."

In addition, the proceeding before the Commission for the approval of a plan is comparable to a "trial", surrounded, in compliance with the due process requirements of the Constitution, with the usual safeguards of notice and an opportunity to be heard, public hearings and the maintenance of appropriate records.

In view of this limited participation of the district court in the approval of a plan under section 11(e) [and (d)] as contrasted with the affirmative requirement of Commission approval in all instances and the "trial" nature of the proceeding before the Commission, it is submitted that the district court's independent duty in the event of resort to it does not extend to making a *de novo* determination as to the fairness of a plan presented for enforcement.

If a district court in a section 11(e) proceeding is authorized to consider the matter *de novo* and in addition is permitted to substitute its conclusions for the determination of the Commission, and if the court's "independent" judgment in such case is to prevail, there would be little use in retaining the Commission. This process, if permitted, would only duplicate the uncertainty of any particular case and would bring it out at the end of the administrative stage of the proceedings with nothing settled which might not be overruled because a district judge might take a different view of the evidence. After the Commission has spoken, the whole case would still be as open, and

the nature of the ultimate decision as uncertain, as if no proceedings had yet been had. Such a hazard is not one which the security holders ought fairly to be called upon to bear.[83] Congress never contemplated any such result.

C. Section 11(e) Offers a Method of Review Alternative to That Under Section 24(a).

The view as to the limited nature of the functions of a section 11(e) court is fortified by the express provision for direct review by a court of appeals under section 24(a). This division or allocation of the judicial function (for which no analogy exists under section 77 and 77B or its successor, Chapter X, of the Bankruptcy Act) establishes exclusive as well as overlapping areas for the jurisdiction of each court but it is by no means contended that the section 11(e) and section 24(a) courts possess or exercise identical functions.[84] On the other hand, it is seriously urged that these two courts in the overlapping area of their activities exercise a similar review function. Thus in this penumbral zone under sections 11(e) and 24(a), the two courts' functions are coordinate and the proceedings under these sections are alternate avenues for the re-examination of administrative action under section 11 of the Act. Strong support for this conclusion is afforded by virtue of the reliance in both of these proceedings upon the administrative record and

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[83] See Dickinson, *Administrative Justice and The Supremacy of Law* (1927), p. 202.

[84] Thus while the section 24(a) court reviews a broad variety of rules, regulations and final orders of the Commission (many of which never reached a district court), the section 11(e) court exercises both review and equity powers. In fact the differences in phraseology in sections 11(e) and 24(a) may well be ascribed to the absence of complete identity in the functions to be performed by the two courts. Sections 11(e) and 24(a) are printed in Appendix "A", *infra*, pp. 163-5 and 167-8, respectively.

by a comparison of the relative powers of the respective courts therein.

1. Fortuitous selection of review procedure.

Verbal differences in sections 11(c) and 24(a)[85] may be attributed to the duality or admixture of the functions to be performed thereunder by the respective courts and in any event should be interpreted so as to give recognition to the manifest desire of Congress in establishing an expert body to deal with the varied and complex situations under the Act, to secure a uniform administration of the statute.[86] The ultimate purpose of Congress is to be achieved, if possible, and not be frustrated by blind adherence to mere words. Thus in *U. S.* v. *American Trucking Association*, 310 U. S. 534, 543 (1940), this Court, speaking through Mr. Justice Reed, said:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even

[85] Section 24(a), applicable to the court of appeals: "Upon the filing of such transcript such court shall have exclusive jurisdiction to *affirm, modify, or set aside* such order, in whole or in part * * *. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." (Italics ours.)

Section 11(c), applicable to the district court: "If, upon any such application, the court, after notice and an opportunity for hearing, shall *approve* such plan as fair and equitable * * *." (Italics ours.)

[86] Cf. *Dobson* v. *Commissioner*, 320 U. S. 489 (1943).

when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose rather than the literal words."

Whether an 11(e) plan is tested first by a district court is entirely fortuitous. Of course when an 11(e) enforcement proceeding is pending, a court of appeals will not because of judicial comity, pass upon a petition for review.[87] That situation of potential conflict in jurisdiction[88] implicitly identifies the overlapping area in which the 11(e) and 24(a) courts are coordinate and perform the same function. Furthermore, it is possible that an 11(e) plan may be passed upon by the court of appeals before the district court is requested to enforce the plan.[89] In that

[87] *Phillips* v. *S. E. C.*, 153 F. (2d) 27 (C. C. A. 2, 1946), cert. den. 328 U. S. 860; *Okin* v. *S. E. C.*, 145 F. (2d) 206 (C. C. A. 2, 1944); *Gilbert* v. *S. E. C.*, 146 F. (2d) 513 (C. C. A. 7, 1944); *Lownsbury* v. *S. E. C.*, 151 F. (2d) 217 (C. C. A. 3, 1945).

[88] An analogous instance of potential conflict may occur when petitions for review of the same order have been filed in two different courts of appeal. E. g., *L. J. Marquis & Co.* v. *S. E. C.*, 134 F. (2d) 335 (C. C. A. 2, 1943); *Columbia Oil & Gasoline Corp.* v. *S. E. C.*, 134 F. (2d) 265 (C. C. A. 3, 1943); *Marquis & Co.* v. *S. E. C.*, 134 F. (2d) 822 (C. C. A. 3, 1943). Cf. *Lewis* v. *S. E. C.*, not officially reported, C. C. H. Fed. Sec. Serv., Par. 90,428 (U. S. C. A. 8, 1948).

[89] See *Columbia Gas & Electric Corp.*, H. C. A. R. No. 3885 (1942), aff'd *Marquis & Co.* v. *S. E. C.*, 134 F. (2d) 822 (C. C. A. 3, 1943), plan enforced, *Application of S. E. C.*, 50 F. Supp. 965 (D. Del., 1943); *Illinois Iowa Power Co.* v. *North American Light & Power Co.*, 49 F. Supp. 277, 280 (D. Del., 1943). See also *New York Trust Co.* v. *S. E. C.*, 131 F. (2d) 274 (C. C. A. 2, 1942).

It is understandable that an 11(e) proceeding may follow a 24(a) proceeding as the equity powers of the 11(e) court may still be needed to carry out a plan, whereas the converse is not usual. Possibly to avoid conflicts in jurisdiction, the Commission sometimes conditions its orders of approval upon securing the approval of a district court. See R. 144a and *Lownsbury* v. *S. E. C.*, *supra*.

situation it would be anomalous, if the scope of review were to differ when the procedures thus afforded are alternatives.[90] A security holder's rights should be equal whether he is restricted to a 24(a) review because of the absence of 11(e) enforcement proceedings as in the *Phillips* case or he is relegated to the district court as the result of the Commission's condition attached to its order as here and as in the *Lownsbury* case. Obviously, if the district court's reviewing powers are greater than that of a court of appeals under section 24(a) it would not be true, as has been stated, that the procedural device adopted "can do no harm to the rights of a security holder".[91]

The second *Chenery*[92] case, recently decided by this Court, is an illustration of the different route that an 11(e) plan may take other than by way of the district court. In that case, after a prior remand by this Court,[93] the company filed an application for approval of an amended plan which would have allocated securities in a certain manner. The Commission denied such application by order and a petition for review of such order was entertained under section 24(a). There was no plan to enforce in the district court since the Commission had not approved it. Instead, the fairness of the proposed plan was tested

[90] *United Light & Power Co.*, 51 F. Supp. 217, 220 (D. Del., 1943): "I think it may fairly be argued that the appeal provided by Sec. 24(a) and an opportunity to be heard before the District Court under Sec. 11(e) with the concomitant right to appeal under Sec. 25 to, as here, the Third Circuit Court of Appeals, from the District Court's finding are alternative rights of appeal." See also *In re North Continent Utilities Corp.*, 61 F. Supp. 419, 421 (D. Del., 1945).

[91] 151 F. (2d) 217, 221 (C. C. A. 3, 1945).

[92] *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194, rehearing den. 332 U. S. 783 (1947). See also *New York Trust Co.* v. *S. E. C.*, *supra*, n. 89.

[93] 318 U. S. 80 (1943).

by review in the Court of Appeals for the District of Columbia.

In the present case, if Engineers had persisted in its application for approval of its original plan which proposed to retire the preferred at $100 per share, the Commission would have entered an order denying the application. Then, as in the second *Chenery* case, the Company or a common stockholder could have petitioned directly to the court of appeals for review under 24(a) and the district court would not have been involved. The original plan actually contemplated this procedure (R. 1320a). The mere fact that Engineers elected to abandon its original plan should not put the Commission's order to a different test as to its validity.

Another anomalous situation is possible if there are different standards of review depending upon how the Commission's order is tested. When Engineers dissolved its subsidiary, *El Paso Electric Co. (Del.)*, H. C. A. R. No. 5499 (1944), it filed an application-declaration pursuant to sections 10 and 12 of the Act. Although the Commission applied the standards of section 11, the only way the Commission's order could have been tested would have been by way of section 24(a). Had the Company proceeded in this case as it did with *El Paso (Del.)*, again there would have been no occasion for the District Court to pass on the fairness of the Company's proposals.[94]

As a matter of fact, the plan did not contain a request for court enforcement and without such a request the District Court could not have obtained

[94] This possible mode of procedure was considered by Engineers' counsel, R. 1735a.

jurisdiction.[95] It was only after the matter was taken under advisement by the Commission and after this Court sustained the constitutionality of section 11(b)(1)[96] that the Company requested the Commission to apply for enforcement in the event the plan was approved. It is urged that the purely fortuitous entry of the district court into this proceeding should not be permitted to affect the rights of the preferred stockholders.

2. Comparable status of administrative record and relative judicial power in 11(e) and 24(a) proceedings.

The view that 11(e) and 24(a) proceedings are alternative avenues for the review of a plan is reinforced by reason of their reliance upon the same administrative record and by a comparison of the relative power of the respective courts thereunder. Thus both the proceedings are conducted on the basis of the administrative record, whether by virtue of express statutory provision therefor under section 24(a) or in accordance with the preponderance of decisional authorities under section 11(e).[97] Contrary to the weight of authority are the *obiter dicta*[98] in the opinion below authorizing the receipt of additional evidence by the section 11(e) court. In that connection the court below stated that a section 11(e) court may "receive evidence *aliunde* the Commission's

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[95] It was not the intention to consummate the plan until the case pending in this Court was decided. R. 1314a. See R. 11a.

[96] *The North American Co. v. S. E. C.*, 327 U. S. 686 (1946).

[97] *In re Electric Bond & Share Co.*, 73 F. Supp. 426, 443 (S. D. N. Y., 1946); *In re Laclede Gas Light Co.*, 57 F. Supp. 997, 1002 (E. D. Mo., 1944), aff'd *sub nom. Massachusetts Mutual Life Ins. Co. v. S. E. C.*, 151 F. (2d) 424 (C. C. A. 8, 1945), cert. den. 327 U. S. 795; *In re Jacksonville Gas Co.*, 46 F. Supp. 852 (D. Fla., 1942); *In re Eastern Minnesota Power Corp.*, C. C. H. Fed. Sec. Service, Par. 90,339-1 (D. Minn., 1947).

[98] No additional evidence was introduced in the hearing before the District Court.

record respecting the fairness and equity of a plan" and "may decide upon the new evidence and upon that contained in the Commission's record that the plan is unfair and inequitable and remand the proceeding to the Commission for further consideration" (R. 26). Such unlimited reopening of the administrative record is fraught with danger, as it permits in effect a trial *de novo* by the district court and affords an opportunity to obstructionists to make a Roman holiday of these complex simplification proceedings. The delay incident thereto may, in a swiftly moving world and a dynamic economic society, result in a procession of stale records and thus in a complete frustration of Congressional intent. Besides, the ruling of unfairness by the district court on the basis of the additional evidence not heard by the Commission may conceivably be construed as binding upon the Commission, even though such limitation upon it is not intended. Therefore, these dicta permitting the reopening of the administrative record must be rejected as a mistaken reliance by the court below upon the inapplicable concept of the traditional equity reorganization tribunal and repudiated as contrary to the rule uniformly and generally applied by the federal, appellate and lower courts in other circuits, to 11(e) proceedings under the Act (*supra*, n. 97) and implicitly recognized in cases applying the substantial evidence ruling (*infra*, n. 100), and also followed in analogous cases.[99]

Under the majority view, as indicated above, the same rule on hearing additional testimony characterizes both the 11(e) and 24(a) proceedings. Explicit recognition of this identical characteristic of the hearing is found in *In re Electric Bond & Share Co.*,

[99] *E. g. St. Joseph Stock Yards Co.* v. *U. S.*, 298 U. S. 38, 54 (1936).

supra, when the District Court, in quoting from the case of *Laclede Gas Light Co., supra*, said:

> "* * * we can see no more reason for permitting evidence to be offered other than the record made before the Commission in a hearing under Section 11(e) than in a hearing under Section 24(a) of the Act, and especially do we believe this should be the rule when the Court of Appeals may "modify" or "set aside" order of the Commission "in whole or in part" and yet is restricted in the receipt of evidence, solely to send the case back to the Commission to hear such additional evidence. *A reasonable interpretation of the Act does not permit a more liberal rule on hearing additional testimony in case before the Court under Section 11(e) than under Section 24(a) of the Act.*"
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> "*The province of the District Court in a §11 (e) enforcement proceeding is that of a reviewing authority. Okin v. S. E. C.*, 2 Cir., 1944, 143 F. 2d 206. * * *" (73 F. Supp. 443) (Italics ours.)

The *Laclede* and *Electric Bond* cases, *supra*, also shed light upon the respective powers of the court of appeals under section 24(a) and of the district court under section 11(e) in passing upon the action of the Commission. It is significant that the 24(a) court may "affirm, modify or set aside * * * in whole or in part" any order issued by the Commission, while the 11(e) court can only "approve" or "disapprove" a plan. Thus the 24(a) court has received a broader grant of power for the review of administrative action than the 11(e) court. Consequently, it would seem unwarranted to imply greater power in the 11(e) court than that in a 24(a) court to hear additional evidence and to pass upon a plan. The facts that the 24(a) and 11(e) proceedings are conducted in similar

fashion on the basis of the administrative record and that the 11(e) court has no greater power than the 24(a) court, lend support to the view that these proceedings afford alternative methods of review of the same scope in those areas where their functions overlap. To that extent, the 11(e) and 24(a) courts possess coordinate status and perform a comparable review function.

D. The Section 11(e) Court Is Required to Accept the Findings of the Commission Respecting the Fairness of a Plan, If Based Upon Substantial Evidence and Possessing a Rational Basis in Fact and Law, and May Not Substitute Its Own Judgment for That of the Commission.

The scope of review by the district court under section 11(e) corresponds to that of the court of appeals in direct review under section 24(a). The court of appeals under section 24(a) must accept as conclusive the findings of the Commission if supported by substantial evidence. That same standard of review, we maintain, must be applied by the district court under section 11(e) in passing upon the fairness of a plan.

Uniformly and generally,[100] both before and after

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[100] *In re New England Power Ass'n*, 66 F. Supp. 378 (D. Mass., 1946), aff'd *sub nom. Lahti* v. *New England Power Ass'n*, 160 F. (2d) 845 (C. C. A. 1, 1947);
Ladd v. *Brickley*, 158 F. (2d) 212 (C. C. A. 1, 1946), cert. den. 330 U. S. 816 (1947);
In re Kings County Lighting Co., 72 F. Supp. 767 (S. D. N. Y., 1947), aff'd *sub. nom. Public Service Commission of N. Y.* v. *S. E. C.*, 166 F. (2d) 784 (C. C. A. 2, 1948);
In re Laclede Gas Light Co., 57 F. Supp. 997 (E. D. Mo., 1944), aff'd *sub nom. Massachusetts Mutual Life Ins. Co.* v. *S. E. C.*, 151 F. (2d) 424 (C. C. A. 8, 1945), cert. den. 327 U. S. 795;

[Footnote continued on following page.]

the decisions below,[101] the other federal appellate and lower courts have applied the principle that the Commission's findings are to be sustained if supported by substantial evidence or unless "shown to be without a rational basis in fact or to be predicated upon a clear cut error of law".[102] Thus, according to the preponderance of judicial authorities, the scope of review by a section 11(e) court is delineated in terms of the doctrines of substantial evidence and administrative finality.

The District Court should not have ignored as it did, the findings of the Commission respecting the fairness of the plan. Such treatment was certainly unwarranted in view of this Court's admonition in

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[Footnote continued from preceding page.]

In re Northern States Power Company, 80 F. Supp. 193 (D. Minn. 1948);
In re American and Foreign Power Company, 80 F. Supp. 514 (D. Me. 1948);
In re Eastern Minnesota Power Corp., C. C. H. Fed. Sec. Serv., Par. 90,399-1 (D. Minn., 1947);
In re New England Public Service Company, 73 F. Supp. 452 (D. Me., 1947);
In re Electric Bond & Share Co., 73 F. Supp. 426 (S. D. N. Y., 1946);
In re Jacksonville Gas Co., 46 F. Supp. 852 (D. Fla., 1942).

101 The District Judge's view in the instant case as to his "affirmative and independent duty" to consider the fairness and equity of the plan, which the Circuit Court has in substance adopted, is of relatively recent vintage, and does not square with his own earlier expressions and other decisions within the Third Circuit which are in accord with the majority doctrine of substantial evidence. *E. g.*: *In re Central & South West Utilities Co.*, 66 F. Supp. 690, 693 (D. Del. 1946); *In re Standard Gas and Electric Co.*, 59 F. Supp. 274, 283 (D. Del. 1945), reversed on other grounds, 151 F. (2d) 326 (C. C. A. 3, 1945); *In re United Light & Power Co.*, 51 F. Supp. 217 (D. Del. 1943).

102 *Lahti* v. *New England Power Ass'n*, *supra*.

U. S. v. Morgan, 307 U. S. 183, 191 (1939), to the effect that:

> "* * * court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice. * * * Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body * * * can rightly be regarded by the other as an alien intruder * * *"

Yet it is not our contention that the enforcing court is a mere "rubber stamp" or "should blandly accept the Commission's findings", but it is urged that the Commission's action is not to be taken as lightly as was done by the two courts below. *Ladd* v. *Brickley*, 158 F. (2d) 212, 216 (C. C. A. 1, 1946), cert. den. 329 U. S. 819 (1947); *In re Northern States Power Company*, 80 F. Supp. 193, 201 (D. Minn. 1948). Thus in the *Ladd* case, *supra*, where this view was recently announced, the Court of Appeals said:

> "* * * No court worth its salt will willingly make itself a rubber stamp for approving administrative Commission action. But the studied conclusion of an expert body which has made a prolonged investigation of a subject from the standpoint of the public interest is to be taken seriously."

Similarly, in the *Northern States Power Company* case, *supra*, the court, refusing to accept "blandly" the Commission's findings, recognizes the consistency

of its exercise of its independent judgment with the substantial evidence doctrine in the following language:

> "I conclude, therefore, that the *exercise of my independent judgment* in passing upon the fairness of the plan to the parties involved must be made in recognition of the experience, skill and facilities of the Commission in considering and appraising the facts before it in the lengthy hearings and voluminous testimony during the past five years. *Due weight should be accorded its findings and conclusions in factual matters where there is substantial evidence in support thereof*" (80 F. Supp. 201). (Italics ours.)

Certainly, the district court's duty is no greater than that which exists where a constitutional question is involved, and yet this court has warned that even in confiscation cases,

> "* * * this judicial duty *to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence.* On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency." *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38, 53 (1936). (Italics ours.)

It is thus clear that the concept of an independent duty is consistent with the application of the doctrines of substantial evidence and administrative finality, despite the view of the two courts below. Furthermore, it becomes obvious that the use of such phrases

as "affirmative and independent duty" or "independent judgment" or "independent check" are not determinative as to the scope of the judicial duty, but merely pose the issue as to the extent to which a court is free to reject or is required to accept the findings of an administrative agency based upon substantial evidence or possessing rational and statutory foundation. In any event, the significance attributed to that concept by the court below so as to permit rejection of administrative findings in disregard of the doctrines of substantial evidence and administrative finality, is contrary to the weight of authority both in connection with the Act and in the general field of administrative law.

These findings of fairness do not come to the court as the result of agreement between the parties or the action of a special master approving a plan in the common form of reorganization proceeding, but they come following a thorough consideration by the Commission which has a very broad grant of power from Congress in the premises.[103] The expertness of the Commission and the limited authority of the section 11(e) court lend weight to the soundness of the view as to the duty of such court to sustain the Commission's findings having a rational basis in fact.[104] Furthermore the Commission's findings in respect to the value of the preferred claim (with which the District Court disagreed) are "in the realm not of mathematical demonstration, but of forecast, based upon expert analysis and weighting of a complex

[103] Cf. *In re Standard Gas & Electric*, 151 F. (2d) 326, 331 (C. C. A. 3, 1945).

[104] *In re New England Power Ass'n, supra; In re Northern States Power Company, supra; In re Laclede Gas Light Co., supra; In re Eastern Minnesota Power Corp., supra; In re Electric Bond & Share Co., supra* (n. 100).

array of figures, in which the informed judgment of the Commission counts heavily".[105] In this connection in the *New England Power Ass'n* case, *supra*, it was stated:

> "In truth, any court charged with a review of the findings of the Securities and Exchange Commission, in a matter so complex in its nature as is the present proceeding, should accept the findings of the expert body unless it concludes that an error of law has been committed or the findings are of an arbitrary or capricious nature" (66 F. Supp. 382).

Thus in the *Northern States Power Company* case, *supra*, the District Judge noted the opinion below in the instant case, but followed the view of the Eighth Circuit in *Mass. Mut. Life Ins. Co.* v. *S. E. C.*, giving "considerable weight" to the Commission's findings with a rational basis. In recognizing the "soundness of the views of the Eighth Circuit as to the duty of the Section 11(e) court," he said:

> "* * * It is my duty to exercise my own independent and informed judgment in determining whether I should approve the plan as fair and equitable. On the other hand, unless I am reasonably clear that the Commission has erred in its factual findings, I should be hesitant to send the plan back to it for further consideration. *It has had this reorganization before it for some five years.* The questions involved are most difficult and complex because they deal primarily with forecasts for the future, and the appraisal of the immumerable uncertainties and contingent events in the years to come are bound to give rise to difference of opinion. *The Commission is the only tribunal which can finally approve a plan of reorganization under the Act.* The Court is not

[105] *Lahti* v. *New England Power Ass'n*, *supra*, p. 76, n. 100.

vested with any authority to propose a plan, or even make suggestions as to any allocation herein as between the preferred and common stockholders which will be binding upon the Commission. The *limited authority vested in the Court*, which has either to approve or disapprove the plan, would seem to lend weight to the soundness of the views of the Eighth Circuit as to the duty of a Section 11 (e) court *where there is a 'rational basis' for the Commission's findings.* This Court does not have access to the many facilities which the Commission is afforded through its public utility analysts, accountants, engineers, attorneys, etc., whose experience and training in this particular field should signally equip them to aid the Commission in analyzing and appraising the factual considerations which are controlling herein"[106] (80 F. Supp. 201). (Italics ours.)

These same doctrines of substantial evidence and administrative finality, as enunciated above, have been applied to test the Commission's findings of equivalence which are in issue here. Thus, in *Mass. Mutual Life Ins. Co.* v. *S. E. C., supra,* the Court of Appeals for the Eighth Circuit said:

> "Obviously, whether, upon retirement of outstanding bonds in the reorganization * * * payment of principal, accrued interest, *and* redemption premiums is the equitable equivalent of the bondholders' rights depends upon the facts of each particular case. *The proper measure of such equivalence is for the determination of the Commission in the first instance, and its expert skill in appraising the facts to be considered must be accorded due weight by the Court.*

[106] This passage which was quoted in *In re American and Foreign Power Co.*, 80 F. Supp. 514, 522 (D. Me., 1948), was stated by the District Judge "to represent in clearcut fashion the attitude of this court."

> "*Since there is a 'rational basis' in fact for the finding of the Commission and no 'clear-cut' error of law by either Commission or court, we are not inclined to disturb the conclusion* that retirement of the bonds at principal and accrued interest amounts to the 'equitable equivalent of the rights surrendered'" [151 F. (2d) 430]. (Italics ours.)

Similarly in *Lahti v. New England Power Ass'n., supra*, the First Circuit Court sustained the Commission's finding of equivalence saying:

> "Appellants' real challenge is to the correctness of the finding by the Commission and the district court that the plan is fair and equitable to the persons affected by it. *This finding cannot be upset by us unless it is shown to be without rational basis in fact or to be predicated on a clear-cut error of law*" [160 F. (2d) 850-1]. (Italics ours.)

Analogy persuasive in the instant situation is afforded by precedents under section 77 of the Bankruptcy Act (11 U. S. C. § 205). In *Ecker v. Western Pacific R. Corp.*, 318 U. S. 448 (1942), this Court had the occasion to give extensive consideration to the function of the district court vis-a-vis the Interstate Commerce Commission under section 77. The majority and concurring opinions are in agreement that the Interstate Commerce Commission's determination of value and also of compatibility of the plan with the public interest is left to the Commission "without necessity of a reexamination by the court when that determination is reached with material evidence to support the conclusion and in accordance with legal standards" and is to be questioned only as to "whether the Commission acted wholly without evidence arbitrarily or in disregard of recognized criteria"

(318 U. S. 473, 512). Likewise, in *New York, New Haven & H. R. Co.* (D. Conn. 1943), 54 F. Supp. 595, 604, aff'd in part and rev'd in part on other grounds (C. C. A. 2, 1945), 147 F. (2d) 40, cert. den. 325 U. S. 884, 65 St. Ct. 1577 (1945), the court said:

> "As I construe the recent Supreme Court cases referred to above [*Ecker* v. *Western P. R. Co.*, 318 U. S. 448 and *Institutional Investors* v. *C. M. & St. P. & P. R. Co.*, 318 U. S. 523], this finding [value of securities being exchanged] is binding on the Court. The underlying facts were such as to furnish support either for the conclusion reached or for the conclusion contended for. The conclusion adopted was the product of the experienced judgment of the Commission. Certainly the subject matter was one of valuation: the direct issue was the equivalence between the new securities and the old.
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> * * * *
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> "'* * * The language chosen leaves to the Commission, we think, the determination of value without the necessity of re-examination by the Court, when that determination is reached with material evidence to support the conclusion and in accordance with legal standards.'"

Similar treatment should be afforded the Commission's determination of value in view of the broader grant of power to the Commission than to the Interstate Commerce Commission or by virtue of the force of statutory analogy and the doctrine of *pari materia*.[107]

Another aspect of the *Ecker* case is relevant to our discussion. Under section 77(e) of the Bankruptcy

[107] See Sutherland, *Statutory Construction* (Horack, 3d Ed.), §5202. Cf. *Merrill* v. *Fahs*, 324 U. S. 308 (1945).

Act, the Interstate Commerce Commission is authorized to eliminate from the reorganization certain claimants if the worthlessness of their claims is found by the Commission, "and the judge shall have affirmed the finding". Although the statute requires re-examination by the district judge of the Interstate Commerce Commission action in this regard, this Court stated:

> "* * * The specificity of the direction for re-examination of the Commission's action points to a wider scope of review than an inquiry as to whether statutory standards for valuation have been followed. * * * But we think the *requirement of affirmation of the exclusion of claimants does not require an independent appraisal* of the valuation which ordained their elimination. The court properly affirms the Commission, when it finds no legal objection to the Commission's use of its own valuation to determine whether particular claimants are entitled to participate in the reorganization" (318 U. S. 478-9). (Italics ours.)

The function of the Commission in the instant case is substantially similar to the Interstate Commerce Commission's duty in the respect just noted in the *Ecker* case. Here, too, it is necessary to determine the participation of the preferred stocks. While in the *Ecker* case the determination was a negative or zero participation, in the instant case the determination was a positive or dollar valuation. Consequently, the determination as to the *quantum* of the participations in both cases should be subject to the same scope of review.

The *Ecker* case is significant to our present inquiry in one further respect in view of its discussion of the extent of re-examination of an issue of fairness. In

this connection the concurring opinion indicates that the court in passing upon the issue of fairness should accord finality to the Commission's action if based upon a "substantial foundation in the facts". The language of the concurring opinion is as follows:

> "* * * * In other cases, where the issue of fairness and equity depends upon the facts disclosed, I think it is the duty of the court to go farther and examine the plan sufficiently to satisfy itself that the rule of absolute priority announced in the *Boyd* Case and in the *Los Angeles Lumber Co.* and *Consolidated Rock Products Co.* Cases has not been violated. In performing this duty the court should accord great weight to the Commission's action. It should require the objector to show that the Commission has failed to respect the doctrine. But it should not accord finality to the Commission's action if there be any evidence to support it. I believe the court is charged by subsection (e) with the duty of determining that, in the allocation of securities in the reorganized company, the Commission has a *substantial foundation in the facts for the* allocation of securities required by the plan it approves"[108] (318 U. S. 515). (Italics ours.)

The acceptance, in the concurring opinion in the *Ecker* case, of the doctrine of substantial evidence for testing the Interstate Commerce Commission's determination of fairness affords a persuasive guide for its application to the present case.

As sections 11(e) and 24(a) are, to the extent indicated above, alternate avenues for the review of 11(e) plans, the scope of review thereunder, it is submitted,

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[108] The phrase "substantial foundation in the facts" apparently accords with the concept of substantial evidence as contained in section 10(e)(B)(5) of the Administrative Procedure Act. See discussion *infra* at p. 92, n. 120.

should be the same. The standard of review of administrative action applicable under section 24(a) of the Act has recently been restated by this Court in *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194, 207-8, rehearing den., 332 U. S. 783 (1947), in the following terms:

> "The scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action. The wisdom of the principle adopted is none of our concern. * * * *Our duty is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress.* See *National Broadcasting Company* v. *United States*, 319 U. S. 190, 224.
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> "We are unable to say in this case that the Commission erred in reaching the result it did. The facts being undisputed, *we are free to disturb the Commission's conclusion only if it lacks any rational and statutory foundation.* In that connection, the Commission has made a thorough examination of the problem, utilizing statutory standards and its own accumulated experience with reorganization matters. * * *
>
> "* * * The 'fair and equitable' rule of §11(e) * * * [was] inserted by the framers of the Act in order that the Commission might have broad powers to protect the various interests at stake. * * * *The very breadth of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in these matters.*" (Italics ours.)

The second *Chenery* case, *supra*, expounds a doctrine of judicial review of administrative action, which, although deemed not controlling in the case at bar by

the court below, we submit, is applicable here and at variance with the lower court's position and affords the correct test of administrative action, whether judicial review occurs *via* section 11(e) as in the instant case, or *via* section 24(a)[109] of the Act as in the second *Chenery* case. Furthermore, that scope of review is the same, according to this Court, even where, assuming *arguendo*, as the court below suggests,[110] the Commission has announced and applied a "new doctrine of investment value" (R. 38) in the evaluation of the rights surrendered in the simplification of a holding company system.

The "weighting of a complex array of factors",[111] based upon expert analysis calls for an economic[112] judgment by the Commission. Such economic determination is entitled to the "greatest amount of weight", as it lies primarily in the informed discretion of the Commission and is a judgment, of the type which the Commission is especially equipped to make, being based upon statutory standards and its own accumulated reorganization experience. The unique role of the Commission under the Act was recognized

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109 Section 24(a) of the Act [15 U. S. C. §79x(a)] provides in pertinent part as follows: "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

110 It is of interest to note that the court below now considers the second *Chenery* case as not controlling (R. 33) but previously referred to the first *Chenery* case [318 U. S. 80 (1943)] as not precisely apposite, but as showing "the general approach of the Supreme Court to the problems presented by the Act". *In re Securities & Exchange Commission*, 142 F. (2d) 411, 420, n. 22 (C. C. A. 3, 1944).

111 *Lahti* v. *New England Power Ass'n*, *supra*, p. 76, n. 100.

112 It is the function of the Commission to give each class of security holders the "full economic equivalent" of its present holdings in satisfaction of the full priority rule. See *Schwabacher* v. *United States*, 334 U. S. 182 (1948).

by this Court when it stated on a related question in *American Power and Light Company* v. *S. E. C.*, 329 U. S. 90, 112-13 (1946):

> "* * * In dealing with the complex problem of adjusting holding company systems in accordance with the legislative standards, the Commission here has accumulated experience and knowledge which no court can hope to attain. *Its judgment is entitled to the greatest weight.* While recognizing that the Commission's discretion must square with its responsibility, only if the remedy chosen is unwarranted in law or is without justification in fact should a court attempt to intervene in the matter." (Italics ours.)

Under such circumstances, it would seem that Congress intended that the economic judgment of the Commission on which the fairness of the 11(e) plan in the instant case rests should not be disturbed by a district court, by its own discretionary weighing of the factors and in its roving through the evidence to seek support for its own conflicting inferences and conclusions.[113] Highly appropriate is the statement of this Court in *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 522, 523 (1944), when in passing upon the relative powers and responsibilities of two federal agencies as well as the courts under wartime stabilization legislation, it said:

> "That the weight to be given to stabilization considerations in relation to other factors calls

[113] *Commissioner* v. *Scottish American Investment Co.*, 323 U. S. 119, 124 (1944). As this Court noted with respect to a similar function of a court in reviewing a decision of the Tax Court:

> "* * * The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or litigants may consider more reasonable or desirable."

for an exercise of judgment in any given case is not denied by the Administrator. * * * The opinion of the Administrator is not, as we have pointed out, mandatory on the Commission. *Nor is such an economic judgment the function of the courts unless all that has been established in administrative law concerning the limitation on judicial review is to be thrown overboard. The decision of such a matter by the Commission is clearly not reviewable by a court because it thinks differently of the weight that should be accorded to some factors in relation to others.*

* * * *

"* * * it is not for the Court to set aside, without legislative command, its slow-wrought general principles which protect the *finality* and *integrity of decisions by administrative tribunals.*" (Italics ours.)

Accordingly, the balancing and weighing of the factors is for the Commission to determine and the substitution by the court of its own appraisal thereof would usurp the administrative function.[114]

The view, as enunciated by the majority of courts, that the Commission's findings and determination of fairness[115] under section 11(e), when supported

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114 Cf. *New York* v. *United States*, 331 U. S. 284, 349 (1947).

115 Since in determining the fairness and equity of a plan the Commission must consider both law and facts, even a conclusion of the Commission on a question of law must be accorded at least great weight if not finality. Mr. Justice Jackson's language in the *Dobson* case regarding the status of the Tax Court's determinations is apropos here:

"* * * In view of the divisions of functions between the Tax Court and reviewing courts it is of course the duty of the Tax Court to distinguish with clarity between what it finds as fact and what conclusion it reaches on the law. In deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter. The Tax

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by substantial evidence or possessing a rational and statutory foundation, are not to be disturbed by the district court, is in accord with the prevailing decisional and statutory trends and authorities in the general field of administrative law.[116] Under the present state of the law, the administrative determinations of a wide variety of governmental agencies and regulatory commissions are uniformly and generally reviewed on the basis of the doctrines of substantial evidence and administrative finality, where the scope of review is not specifically prescribed by statute.[117] These same standards of

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Court is informed by experience and kept current with tax evolution and needs by the volume and variety of its work. While its decisions may not be binding precedents for courts dealing with similar problems, uniform administration would be promoted by conforming to them where possible." *Dobson* v. *Commissioner*, 320 U. S. 489, 502 (1943).

A similar view is expressed by this court in *Levinson* v. *Spector Motor Service*, 330 U. S. 649, 672 (1947), when it said with respect to certain conclusions of law of the Interstate Commerce Commission:

"As conclusions of law, these do not have the same claim to finality as do the findings of fact made by the Commission. However, in the light of the Commission's long record of practical experience with this subject and its responsibility for the administration and enforcement of this law, these conclusions are entitled to special consideration. * * *"

[116] See Cushman, *The Independent Regulatory Commissions* (1941), p. 475.

[117] *E. g.*, *National Broadcasting Co.* v. *U. S.*, 319 U. S. 190, 224 (1943); *Gray* v. *Powell*, 314 U. S. 402, 411-13; *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, 139, 140, 145, 146 (1939); *U. S.* v. *Morgan*, 307 U. S. 183, 199 (1939); *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 473 (1943); *RFC* v. *Denver & Rio G. W. R. Co.*, 328 U. S. 495, 508-9 (1946); *Dobson* v. *Commissioner*, 320 U. S. 489 (1943); *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469, 477-8 (1947). See Stern, *Review of*

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review of administrative action have been codified in the Administrative Procedure Act [118] which has been held declaratory[119] of the existing law of judicial review. It is significant in this connection that the legislative history of the Administrative Procedure Act clearly reveals that the courts' "exercise of their independent judgment" is consistent with their application of the substantial evidence doctrine in the review of administrative action.[120] These codified

[Footnote continued from preceding page.]

Findings of Administrators, Judges and Juries: A Comparative Analysis, 58 Harv. L. Rev. 70, 75, 99 ff. (1944); Stason, *"Substantial Evidence" in Administrative Law*, 89 U. of Pa. L. Rev. 1026 (1940); Brown, *Fact and Law in Judicial Review*, 56 Harv. L. Rev. 899, 921 ff.

[118] Section 10(e)(B)(1) and (5) of the Administrative Procedure Act [60 Stat. 243; 5 U. S. C. §1009(e)(B)(1) and (5)]. Section 10(e)(B)(1) and (5) require the reviewing court to "(B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and "(5) unsupported by substantial evidence in any case, * * * reviewed on the record of an agency hearing provided by statute". The Senate Judiciary Committee has indicated that "The fifth category necessarily limits the substantial evidence rule to cases in which Congress has required an administrative hearing in which the administrative record may be made" (Sen. Doc. No. 248, 79th Cong., 2nd Sess., p. 39 (1946).

[119] *Olin Industries* v. *N. L. R. B.*, 72 F. Supp. 228 (D. Mass., 1947).

[120] Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 279. The House Judiciary Committee states in its report:

> "'*Substantial evidence*' means evidence which on the whole record is clearly substantial, plainly sufficient to support a finding or conclusion under the requirements of section 7 (c), and material to the issues. It is exceedingly important. Difficulty has come about by the practice of agencies and courts to rely upon something less—suspicion, surmise, implications, or plainly incredible evidence. *Although the agency must do so in the first instance, under this bill it will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment*

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rules as to the scope of review represent the crystallization, by legislation, of the developments in the field of administrative law and consequently afford persuasive support for their application to the instant case.

The force of reason as well as the historical evolution of administrative law impels the conclusion that the determination of the Commission receive the same dignity afforded the rulings of other administrative agencies where the statute is not explicit as to the scope of review. The Commission's action, when tested by every theoretical and practical reason for administrative finality,[121] is entitled to the highest credit in the courts. The Commission is an independent expert body dealing with a subject highly specialized and complex. Its procedures assure fair hearings and its deliberations are evidenced by careful opinions which habitually utilize all guides to judgment available to judges. It is relatively better staffed for its task than the judiciary. Its members not infrequently bring to their task long legislative or administrative experience in their subject. The volume of matters flowing through the Commission keeps its members informed as to the background of the controversies and the effect of the impact of their decisions upon

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whether on the whole of the proofs brought to *their attention the evidence in a given instance is sufficiently substantial to support a finding*, conclusion, or other agency action or inaction. In reviewing a case under this fifth category the *court must base its judgment upon its own review of the entire record* or so much thereof as may be cited by any party." (Italics ours.)

121 Cf. *Dobson* v. *Commissioner*, 320 U. S. 489 (1943) (Paraphrase). By statute the principle of the *Dobson* case has been rendered inapplicable to decisions of the U. S. Tax Court. (See section 36 of Public Law 773, 80th Cong., 2nd Sess., C. 646, amending section 1141-(a) of the Internal Revenue Code.)

the industry and the administration of the Act. Individual cases are disposed of wholly on records publicly made, in adversary proceedings.

Furthermore, the consideration of a uniform and expeditious administration of the Act demands that the Commission be given all the credit to which it is entitled under the law and that its decisions receive identical treatment. The dispersal of section 11(e) enforcement proceedings to district courts all over the country tends inevitably to produce conflicting decisions and the concomitant lack of uniformity, particularly if every district court is given the power to substitute its judgment for that of the Commission.

Uniform application of the Act can only be accomplished by the coordination of the standards of review under section 11(e) and section 24(a) on the basis of the doctrines of substantial evidence and administrative finality as enunciated by this Court. Such application of these principles of limited review would constitute a reasonable interpretation of the Act, consistent with the legislative history and the Congressional intention; accord with the preponderant judicial authorities passing upon the question under the Act; follow analogous precedents under the law of reorganization; apply the prevailing decisional and statutory authorities in the general field of administrative law; and finally give proper recognition to an expert body possessing a broad grant of power.

II. Involuntary Liquidation Preferences Are Not Controlling.

The Engineers' charter provided in part that "In the event of liquidation, dissolution or winding up * * * or any reduction of its capital stock, resulting in any distribution of its assets", the preferred stockholders in the three series are to receive an amount equal to $100.00 per share, "together with all dividends accrued or in arrears thereon, plus, in case such liquidation, dissolution or winding up or reduction shall have been voluntary, the fixed redemption premiums for such series", before any distribution of its assets to the common stockholders (R. 1412a). In considering this charter provision, three members of the Commission were of the opinion that the dissolution as proposed was neither voluntary nor involuntary within the meaning of the charter (R. 138a), while one commissioner held that it was clearly a voluntary act contemplated by the parties (R. 141a). On the other hand, the District Court preferred "not to definitely decide" the applicability of the charter provision to a "true liquidation" as distinguished from the "fictitious liquidation" involved in the *Otis* case, but "to consider the charter provisions as but one of several factors in determining the relative rights of the various security holders" (R. 287a-288a, 317a). The court below, however, deemed charter provisions as not "dispositive", under a "proper application of one of the principles enunciated" by the Supreme Court in *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 637 (1945) (R. 34).

The issue is thus raised as to whether the charter liquidation provisions are the conclusive measure of the respective participations of the common and preferred stockholders. We shall contend below (A) that the charter liquidation provisions, voluntary and

involuntary, are not conclusive; (B) that if operative, then the voluntary liquidation provisions are determinative; and (C) that the involuntary liquidation provisions, even if applicable, are not controlling in a determination of a fair and equitable plan, under the statute and Constitution.

A. Charter Liquidation Provisions Are Not Conclusive.

The *Otis* case, as the court below indicated, is the answer to any contention as to the applicability of the charter provisions. In the *Otis* case, this Court held that a charter written in 1929 did not as a matter of federal law, contemplate action required by the Act.[122] Surely Engineers' charter prepared in 1925 (R. 1403a) could not have contemplated such action any more than did the charter of the United Light & Power Company. The inapplicability of the Engineers' charter provisions is an *a fortiori* application of the *Otis* principle.

If there were any doubt that the proposed dissolution was not contemplated when the Charter was drafted, that doubt is removed by the contentions of counsel for Engineers in the *Western Public Service Co.* case, 12 S. E. C. 804 (1943), where he urged:

> "When you act under the bankruptcy laws of Chapter X on account of a financial failure, the stockholders must be deemed to have had the financial failure of this organization in mind when they acquired their investment. Section 11

[122] As stated in the *Otis* case:

> "* * * The provision having been adopted in 1929, six years prior to enactment of the Public Utility Holding Company Act, a 'simplification' under this Act, having as an incident to it the dissolution of one company in a holding company system, was not an anticipated 'liquidation' within the meaning of Power's charter provision" (323 U. S. 637).

is not a situation where the company is in financial difficulty in the ordinary sense, and it certainly would be so in our case, because we have no bonds, we have no bank debt, we just have preferred stock. It is an arbitrarily and forced statutory termination of the enterprise, and *it has no relation whatsoever to any factors which the parties could have had in mind when they entered the enterprise*" (R. 256a).[123] (Italics ours.)

The absence of the word "involuntary" from Engineers' charter is of no consequence. The draftsman (R. 256a) of Engineers' charter, its counsel, consistently referred to the provisions regarding the payment of $100 in liquidation as applicable in the event of "involuntary" dissolution.[124] So, too, did the Company in its annual reports before there was any thought of dissolving (R. 1517a). In any event, the dissimilarity in language in these charters is not significant as the dissolution under the Act is distinct from the type of action envisaged under the charter, whether voluntary or involuntary. As stated in the *Otis* case:

"* * * The exercise of legislative power by Congress through Section 11(b)(2) to accomplish simplification as a matter of public policy and the Commission's administration of the Act by dissolution of this particular company results *in a type of liquidation which is entirely distinct from the 'liquidation' of the corporation, whether voluntary or involuntary, envisaged by the charter provisions of Power for preferences to the senior stock*" (323 U. S. 631). (Italics ours.)

It is also clear that any "type" of dissolution, liquidation, etc. "adopted as a matter of administra-

[123] See R. 635a, 1240a.
[124] See for example R. 1211a, 1731a.

tive routine", pursuant to the Act, would not come within the coverage of the charter. In short, the sequence and methods of simplification, such as dissolution, liquidation, merger, consolidation, etc. are procedural details, which do not make the charter provisions applicable. This view finds support in the statement in the *Otis* case, where in distinguishing *Continental Ins. Co.* v. *U. S.*, 259 U. S. 156 (1922), this Court said:

> "* * * We do not feel constrained by its dealing with charter rights as in a normal liquidation to hold that where liquidation is adopted as a matter of administrative routine, the preferences are thereby matured" (323 U. S. 639).

Consequently, any lateral attack upon the *Otis* rule of inoperativeness which seeks to base a distinction upon the supposed continuance or termination of the "enterprise" or "system" is unsound.[125]

An additional reason in support of this conclusion is the fact that Congress, as well as the parties, did not intend the Act (*i. e.*, its exercise of the power to simplify) to render the charter provisions "operative" and mature the charter rights, created without regard to the simplification of system structure. So stated this Court in the *Otis* case:

> "* * * Where pre-existing contract provisions exist which produce results at variance with a legislative policy which was not foreseeable at the time the contract was made, they cannot be permitted to operate * * *" (323 U. S. 638).

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[125] The court below recognizes that the charter provisions are not "dispositive", but seeks to distinguish the instant simplification from the *United Light & Power* reorganization on the basis of the termination of the enterprise in the former and its continuance in the latter. Such distinction is without merit, as shown below at p. 138 *et seq.*

Such construction, of the charter provisions, based in part upon the contemplation of the parties and in part on the legislative policy "to exercise its power with the least possible harm to citizens" precludes the application of the general rules used to interpret ordinary business contracts such as insurance policies. Consequently, any contention urging the analogy to insurance contracts and the like reflects reliance upon the dissenting opinion in the *Otis* case and must be rejected as but an effort to reargue the majority decision in that case. Similarly resort to factual data to demonstrate the prescience or anticipation of the Act by the draftsmen of the charter is doomed to failure. Reaffirmation of this *Otis* principle of "inoperativeness" in this case is further justified in view of its consistent and continuous application by Commission and court alike over a period, to simplification proceedings under the Act, and is required in order to secure a uniform administration of the Act.

B. Voluntary Liquidation Preferences Are Determinative, If the Charter Liquidation Provisions Are Operative.

We have contended above that the charter liquidation provisions are inoperative under the *Otis* rule, but if this Court should conclude otherwise, then it is our contention that the dissolution or liquidation was the voluntary act of the Company and that consequently the voluntary liquidation preferences are determinative.[126]

[126] We had urged below, *inter alia*, that the liquidation was voluntary within the meaning of the charters and that therefore the voluntary liquidation preferences were controlling. In view of the fact that the amounts proposed to be paid under the Com-

[Footnote continued on following page.]

We now turn to the question of whether the Company's action is voluntary or involuntary within the contemplation of the charter liquidation provisions. While a voluntary filing of a plan for dissolution of the Company under section 11(e) may not mean that such dissolution is voluntary within the meaning of the charter, the corollary is equally true that because action is taken under section 11(e), it does not follow that such liquidation is involuntary within the meaning of the charter. For example, the *El Paso*[127] case was one where a majority of the Commission felt that in the business context in which that company found itself it would and could be dissolved under State law, absent the Act. Consequently, the liquidation (no distinction between voluntary and involuntary) provisions of the charter were held to be controlling. But neither that case, nor any other, held that a company was not bound by its charter provisions if the liquidation proposed was not necessitated by the Act and was within the contemplation of the contracting parties.

The management and its counsel have consistently urged that the Act did not require the termination of the Company's existence. For example, in 1941 when

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[Footnote continued from preceding page.]

mission's opinion as the "present investment worth" equal both the voluntary redemption prices and the voluntary liquidation preferences, we concurred in the Commission's presentation for the purpose of the appeal to the court below, but expressly reserved our contention that under the circumstances of this case the liquidation was voluntary within the meaning of the charter. In our petition for writ of certiorari, we also indicated our intention to argue this issue as an alternative question.

[127] H. C. A. R. No. 5499. See also Commissioner Caffrey's dissent in *United Light and Power Company*, H. C. A. R. No. 6603 (1946).

Engineers sought permission to acquire 5,000 shares of its preferred stock by tenders, the Commission had occasion to note that "Engineers * * * takes the position that it is not certain that there will be necessarily a liquidation of Engineers Public Service Company".[128] Similarly, Barnes (President of Engineers) testified, in the *Western*[129] case, that the pending Section 11 proceeding was not likely to result in the "liquidation" of Engineers. In the brief which Company counsel filed in the *Western* case, one of the points he urged was that "the pending (11b) proceeding is not likely to result in the liquidation of Engineers". (R. 1241a).

Furthermore, there is no order under 11(b)(2) requiring the liquidation of Engineers and it was certainly not clear that such an order would have been entered as a matter of course if Engineers had not presented the plan now before the Court. Besides, the 11(b)(1) orders pursuant to which Engineers has been allegedly liquidating had been set aside by the Court of Appeals for the District of Columbia. *Engineers Public Service Co. v. S. E. C.*, 138 F. (2d) 936 (App. D. C., 1943), cert. granted, 322 U. S. 723 (1944). Certiorari was granted by the Supreme Court, but disposition was not had because of the lack of a quorum. On October 20, 1947, this Court dismissed the appeals as moot [332 U. S. 783 (1947)], since in the meantime, Engineers had disposed of the properties which were the subject of Commission's orders, in the consummation of the plan, approved and enforced by the District Court's order dated May 29, 1947. In that connection dissolution of Engineers has in fact taken place and the direc-

[128] H. C. A. R. No. 2629, p. 7.
[129] 12 S. E. C. 801, 811 (1943).

tors are constituted trustees pursuant to the provision of section 43 of the Delaware Corporation Law [Del. Rev. Code (1935) §2075] (R. 15 n.4).

The management was also free to select other alternatives of complying with the Commission's requirements. There are many ways Engineers could have chosen to comply with the Commission's divestment orders. The merger method which was an alternative originally under the plan, was scrapped because of the appraisal requirements of state law. Other plans were considered, and discarded because the common stockholders would not get exclusive control over the subsidiaries (R. 583a, 643a, 687a). It would have been simple enough to call the preferred stocks[130] and pay them off but when it appeared that there no longer was any tax advantage by keeping Engineers alive, or by merging it with Virginia & Electric Power Company (R. 1320a) but the common stock management decided to adopt the Delaware voluntary dissolution technique although the procedural requirements are not being observed because the dissolution is to occur under Federal law (Cf. R. 15 n. 4).

We contend that the dissolution of Engineers is entirely a voluntary act of the management both legally and factually and submit that the fact that dissolution is occurring in connection with a plan under section 11(e) is therefore immaterial in this case. Accordingly, the voluntary liquidation provisions of the charter should control and determine the rights of the preferred stockholders.

This view was sustained by Commissioner Hanrahan

[130] It is significant that the Commission noted: "Ordinarily a company in this position would exercise its call privilege and redeem the preferred at its call price" (R. 60a).

(now Chairman) when in his concurring opinion he said:

> "* * * The charter provides for payment of the premiums in the event of a voluntary call or voluntary liquidation and it seems clear to me that, within the meaning of such charter provision, the action proposed by Engineers is 'voluntary.' Consequently it follows that fairness and equity require payment to the preferred stockholders of the prices specified in the charter in the event of voluntary liquidation" (R. 140a-141a).

C. The Involuntary Liquidation Preferences, Even If Applicable, Are Not Controlling in the Determination of a Fair and Equitable Plan.

We have urged above that the charter liquidation provisions are not operative in the instant case, but that if operative, that the voluntary liquidation preferences are controlling. Assuming *arguendo* that this Court rejects both contentions, we then urge that the involuntary liquidation provisions of the charter, even if applicable, are not controlling in the determination of a fair plan under both the statute and the Constitution.

The standard of fairness and equity incorporated in Section 11 (e) of the Act imposes the outer limits upon plans thereunder. By adoption of that standard, Congress has in substance decreed that in achieving the objectives of the Act a plan must not produce unfair results. If adherence to charter provisions, such as an involuntary liquidation clause, has that effect, such provisions may not stand in the way of

the Congressional objectives.[131] However, the threat of the due process barrier of the Fifth Amendment to the Constitution is in the instant case unwarranted. The constitutional question is no more "reached" here than in *Otis & Co. v. S. E. C.*, 323 U. S. 624 (1945). Even if it were, the answer to such argument is found in *American Power & Light Company* v. *S. E. C.*, 329 U. S. 90 (1946) and the *North American Company* v. *S. E. C.*, 327 U. S. 686 (1946).[132] The implication from these cases is clear that where under a plan security holders receive "just compensation"

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[131] *North American Company* v. *S. E. C.*, 327 U. S. 686, 705 (1946); *Continental Insurance Co.* v. *U. S.*, 259 U. S. 156, 471 (1922). In the *North American* case, *supra*, this Court said:

> "This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts. And in using this great power, Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. *Swift & Co.* v. *United States*, 196 U. S. 375, 398. To deal with it effectively, Congress must be able to act in terms of economic and financial realities. The commerce clause gives it authority so to act."

Although the two courts below did not pass upon the constitutional issue in view of their respective decisions, the District Court did indicate that "there is respectable opinion that a contractual obligation may be overridden in any case where necessary to achieve an otherwise constitutional purpose" (R. 288a), and the Circuit Court recognized the need to give "just recompense" as an equitable equivalent (R. 38).

[132] In *American Power & Light Company* v. *S. E. C.*, *supra*, this Court rejected largely on the basis of the *North American* case, *supra*, the argument that section 11(b)(2) may affect the rights of investors and holding companies in violation of the Fifth Amendment, and stated:

> "* * * Nor can we say that §11(b)(2) on its face authorizes or necessarily involves any destruction of any valuable interests without just compensation. The legislative policy and the statutory safeguards pointed out in the *North American* case negative that argument" (329 U. S. 106).

for their interest, the due process requirements are satisfied. The substitution of the equitable equivalent for contract rights surrendered involves no destruction of values but merely a change in the form of investment to another of equal value. Accordingly, neither the Act nor the Constitution forbids payment to the preferred of an amount equal to its redemption price established as the equitable equivalent of the rights surrendered under a fair and equitable plan.

III. The Commission Properly Applied the "Fair and Equitable" Standards of Section 11(e) of the Act in Approving as Part of a Plan the Payment to the Preferred Stockholders of Cash Equal to the Current Going Concern Value of Their Shares But Not in Excess of the Call Price Where This Amount Exceeds the Involuntary Liquidation Preference of Such Shares Under the Charter.

Once having concluded on the basis of *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, that the charter liquidation provisions were not dispositive in the instant liquidation (R. 61a) the Commission determined, in accordance with the principle of full priority, whether the plan accorded each security holder "from that which is available for the satisfaction of his claim, the equitable equivalent of the rights surrendered" (R. 62a). The Commission was of the view that the preferred stockholders were entitled to the current investment value of their securities and found that such value was at least equal to the respective call prices of the three series of the outstanding preferreds, treating the call prices as placing a ceiling upon the preferreds' participation (R. 67a). This conclusion was reached after (a) consideration of "all provisions

of the charter applicable to the preferred such as the dividend rate and the call price, as well as the liquidation preferences", (b) analysis of the "financial condition of the company with particular regard to the asset and earnings coverage of the preferred" (R. 62a), and (c) reference to the undisputed testimony of both the preferred stockholders' and company's expert witnesses, that the intrinsic values of the preferred were considerably in excess of the call prices (R. 67a).

On the other hand, measuring the quantum of participation to be allowed the preferred stockholders under section 11 by standards of "colloquial equity", the district court found that the investment value of the preferred stock was not controlling but merely one of the elements to be considered. It stressed as "colloquial" equities which "looked towards non-payment of the premium" (a) issue prices and market history, (b) retention of earnings, and (c) the alleged losses from past divestments under the Act, after "consideration of all factors involved" and "concluded that $100 would be fair and equitable, but that the payment of premiums would not be fair and equitable" (R. 288a-291a).

On appeal, the court below sustained the District Court, concluding that "All pertinent factors and all substantial equities must be considered by the Commission whether equitable equivalents are to be reached by approach *ex* the Act or *intra* the Act" (R. 38). The court below expressed the view that the Commission had "misunderstood the principle of 'equitable equivalents' enunciated by the Supreme Court in the *Otis & Co.* case", and criticized the Commission (a) for substituting "the new doctrine of investment value" for the doctrine of equitable

equivalents; (b) for allegedly failing to give adequate consideration to earning power and supposed "equities" and "factors" (articulated by the District Court as "colloquial" equities); and (c) for allegedly disregarding the fact that "the holding company enterprise is at an end both for the preferred and common", which fact, according to the court below, differentiates the instant case from the *United Light & Power Co.* reorganization.

The issue is thus posed as to whether the Commission has properly applied the fair and equitable standard of section 11(e) in determining the respective participation for each class of stockholders—preferred and common—or whether the two courts below enunciated the correct criteria in terms of "colloquial equity" or its equivalent, for measuring the extent of the participation of the respective classes of stockholders.

A. The Commission Properly Applied the Principle of Full Priority and the Correct Techniques Under the Fair and Equitable Standard in the Valuation of the Respective Interests of the Common and Preferred Stockholders.

Under the doctrine of the *Otis* case, the words "fair and equitable" have received a technical definition as words of art which import the principles of full priority from the equity receivership and bankruptcy reorganization precedents. The principle of full priority requires such treatment be accorded various classes of security interests so that each security holder, in the order of his priority receives from that which is available for the satisfaction of his claim, the equitable equivalent of the rights surrendered. The entire bundle of rights must be determined as though in a continuing enterprise—a going concern

apart from the pending reorganization. Stated in other words, full compensation must be given to senior security holders for the contract rights surrendered on a "going concern" basis and not on liquidation basis, prior to the payment of junior security holders. These principles have been enunciated in the *Otis* case by this court as follows :

> "Like the bankruptcy and reorganization statutes, the Public Utility Holding Company Act, in providing that plans for simplification be 'fair and equitable', incorporates the principle of full priority in the treatment to be accorded various classes of security interests. This right to priority in assets which exists between creditors and stockholders, exists also between various classes of stockholders. When by contract as evidenced by charter provisions one class of stockholders is superior to another in its claim against earnings or assets that superior position must be recognized by courts or agencies which deal with the earnings or assets of such a company. Fairness and equity require this conclusion. * * * This is the rule applied by the Commission in the simplification of corporate structure. The Commission recognizes and applies the doctrine of full priority by giving value to the rights of the preferred in a going concern rather than as if by sale and distribution * * *" (323 U. S. 634-5).

In evaluating the rights surrendered, the liquidation preferences are not matured by the impact of section 11 of the Act, for as stated in the *Otis* case: "Congress did not intend that its exercise of the power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of

creditors" (323 U. S. 638). Consequently the liquidation preferences are only one factor in valuation rather than determinative of amounts payable, as indicated in *Schwabacher* v. *U. S.*, 334 U. S. 182, 199 (1948), where this Court reaffirmed its views in the *Otis* case and applied them to an analogous situation under the Interstate Commerce Act.

Applying these principles to the instant case, which as in the *Otis* case involved a solvent company, the Commission expressed the view that the liquidation preferences were not "conclusive"; considered all provisions of the charter applicable to the preferred such as the dividend rate, the call price and liquidation preferences; carefully analyzed the financial condition of the Company with particular regard to the asset and earnings coverage of the preferred comparing them in the light of these factors with many other utility operating and holding company preferred stocks (R. 61a-68a). The Commission found upon undisputed expert testimony that the preferred stocks had "an investment value at least equal to the respective call prices" of $105, $110 and $110, which "set a ceiling" thereon (R. 65a-68a) and upon a "full consideration of the record" concluded "that the fair and equitable standard would require the payment of an amount equal to the call prices of the securities plus accrued dividends" (R. 68a).

The conclusion that the Commission reached complies with and is required by the views of this Court as enunciated in the *Otis* case and reaffirmed in the *Schwabacher* case. In both the *Otis* and the instant cases, the two classes of stockholders were given the equitable equivalent of their participation as though in a continuing enterprise. The respective classes receive the existing value of their contract rights *inter*

sese, without regard to simplification process. That approach accords with the conclusion of this Court in the *Otis* case:

> "We reach the conclusion that the Securities and Exchange Commission applied the correct rule of law as to the rights of the stockholders *inter sese*. That is to say, when the Commission proceeds in the simplification of a holding company system, the rights of stockholders of a solvent company which is ordered by the Commission to distribute its assets among its stockholders may be evaluated on the basis of a going business and not as though a liquidation were taking place." (323 U. S. 633).

In neither the *Otis* nor the instant case was the Act permitted to mature the liquidation claims and thereby transform the existing values into matured claims which might be greater or less than such existing values. In the *Otis* case, the claim of the preferred stockholders, which, if measured on a liquidation basis would have exceeded its investment value or existing value on a going concern basis, was not allowed to mature. In the instant case, the preferreds' claim, which, if measured on a liquidation basis,[133] would have been less than its investment value (as limited by the call price), as an interest in a continuing enterprise, was not permitted to mature. In both cases, a windfall or a shift[134] in values from one class

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[133] As the preferreds in the instant case would receive amounts at least equal to their respective call prices, both on the basis of their investment values and by the operation of the voluntary liquidation preference under the charter, the maturity of involuntary liquidation preference would result in the payment of less than such amounts and consequently in a "windfall" for the common.

[134] *American Power and Light Co.*, H. C. A. R. No. 6176, p. 8 (1945).

to the other had to be avoided—in the *Otis*, to the preferred; in the instant case, to the common. Such is the force of the mandate in the *Otis* case where this Court said: "Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders" (323 U. S. 637). Consequently, the same rule of valuation on a going concern basis must be applied equally in both instances to avoid a windfall, whether the existing value of the interest turns out to be less or greater than the matured liquidation claim. Otherwise, the rule becomes a one way street by which, in section 11 proceedings, the common stockholders could not lose, and the preferred stockholders could not receive their equitable equivalents. Such unilateral operation of the *Otis* rule was certainly not intended. The effectuation of Congressional policy to avoid "windfall" to a particular group as well as the principles of sound administration and equal justice compels the bilateral application of the rule so both classes—common and preferred—may receive the equivalent of their participation "as though in a continuing enterprise instead of in liquidation". Therefore, since in the instant case, the claim of the preferred stockholders, measured as it were, on a going concern basis or at the call price, at which the common stockholders could have terminated their interest in the enterprise by redemption, exceeds their value on a liquidation basis, the rule of full priority requires the payment of amounts at least equal to their respective call prices in order to satisfy their prior claim to the assets and earnings of the Company. Such analysis would squarely accord with the recent restatement of the *Otis* principle in the *Schwalbacher* case in the following terms:

"In construing the words 'fair and equitable'

in a federal statute of *very similar purposes*, we have held that although the full priority rule applies in liquidation of a solvent holding company pursuant to a federal statute, the priority is satisfied by giving each class the full *economic* equivalent of what they presently hold, and that, as a matter of federal law, liquidation preferences provided by the charter do not apply. We said that, *although the company was in fact being liquidated in compliance with an administrative order, the rights of the stockholders could be valued 'on the basis of a going business and not as though a liquidation was taking place.'* * * * *Otis & Co.* v. *Securities & Exchange Commission*, 323 U. S. 624" (334 U. S. 199). (Italics ours.)

B. The Court Below Misapprehended the Principles and Techniques as Enunciated in the *Otis* Case and Unwarrantedly Criticized the Commission.

Misapprehending the significance of the *Otis* case, as discussed above, the court below claimed that the Commission "misunderstood the principle of 'equitable equivalents'" as enunciated by this Court (R. 38) and criticized the Commission in several respects for its alleged failure to apply the proper techniques and principles in valuation. Thus while the court below agreed with the Commission that the charter provisions are not dispositive of the issues presented and that the doctrine of equitable equivalents "includes within its ambit cash for securities as well as securities for securities" (R. 38), it rejected the principles and methods used by the Commission to arrive at the equitable equivalents of the two classes of securities.

1. The court below erroneously applied a standard of "colloquial equity."

Paying merely lip service to the *Otis* principles, the court below has in reality strayed far afield from the rules established by this Court and has announced that "All pertinent factors and all substantial equities must be considered by the Commission whether equitable equivalents are to be reached by the approach ex the Act or the approach intra the Act" (R. 38). This criterion, apart from its nebulous character, represents only a mirage of consistency with this Court's views and in reality, rejects the conception that the phrase "fair and equitable", as used in section 11(*e*) of the Act, imports the principle of full priority as developed in the receivership and bankruptcy reorganization cases. In place of the principle of full priority as discussed above, the court below proposes a variable and uncertain theory of "All pertinent factors and all substantial equities"—apparently similar to the principle of "colloquial equity"[135] by which the District Court in the instant case sought to measure the participation of the security holders. Such nontechnical significance of the phrase "fair

[135] This standard of "colloquial equity" has been articulated on several other occasions in addition to the instant case by the same District Court, *e. g., In re Community Gas & Power Co.*, 71 F. Supp. 171 (D. Del. 1947); *In re Citizs Service Co.*, 71 F. Supp. 1003 (D. Del. 1947). In *In re United Light and Power Co.*, 51 F. Supp. 217 (D. Del. 1943), which eventually became the *Otis* case, the same District Court announced a similar view, suggesting that the "expression 'fair and equitable' should be given its ordinary non-technical meaning". Despite the District Court's statement as to the application of the standard of colloquial equity in the *Otis* case neither this Court nor the Circuit Court adopted any such nebulous theory.

and equitable", resulting as it does in a substitution of indefinite considerations for the well-defined rights of the security holders, is entirely at variance with the technical definition of that expression, as words of art, as defined in the *Otis* and *Schwabacher* cases. That ambiguous standard, enunciated by the two courts, connotes the application of "nonvaluation" or "non-economic" factors in disregard of the implications from the statement in the *Schwabacher* case that "the priority is satisfied by giving each class the full *economic* equivalent of what they presently hold" (334 U. S. 199).

Reference to various "factors" and "equities" which, in the opinion of the court below, merit special consideration, reveals more clearly their lack of merit and their unsoundness. The two courts below gave primary recognition to the following "factors" or alleged "equities": (a) issue price and market history of the preferreds (R. 289a); (b) retention of earnings; and (c) the alleged losses from divestments under the Act. We shall consider in turn the merits of each of these alleged "equities".

(a) *Issue price and market history.*

The two courts below considered significant the issue price and market history of the preferreds (R. 289a, 301a-302a, 305a). The standards of fairness and equity certainly do not require that such weight be attributed to these factors. Rather is it clear that in the absence of fraud, purchase prices do not affect the measure of the security holders' participation under a section 11(e), plan, by analogy to the bank-

ruptcy reorganization precedents.[136] Certainly the issuance of the preferreds at slightly under par or book value does not make it inequitable to give them slightly more for their interest in the enterprise over twenty years later. Such remote factor may have historical interest but little significance. Moreover, if the preferreds' participation is measured quantitatively in terms of the *number* of dollars invested then, it should be equally appropriate to make a qualitative measurement of the dollars invested in terms of their respective *purchasing power* at the time of the Commission's determination. It is unquestioned that the purchasing power of $100 in 1929 at the time of the issuance of the preferred stocks was far greater than its purchasing power on the date of the approval of the plan by the Commission or on the date of its enforcement by the District Court. In any event, the test, as so aptly stated by Mr. Justice Jackson in the *Schwabacher* case in an analogous situation, "*is not what he once put into a constituent company* but what value he is contributing to the merger that is *to be* made good" (334 U. S. 199). That statement puts the factor of issue price in its proper place, without the special significance, which the District Court attributed erroneously to it.

Market history is likewise of little use in determining present values. The historical fluctuation in market prices reflecting changing economic condi-

[136] *In re Pittsburg Railways Co.*, 159 F. (2d) 630 (C. C. A. 3, 1946) cert. den. 329 U. S. 731; *In re Lorraine Castle Apartments Building Corp.*, 149 F. (2d) 55 (C. C. A. 7, 19) cert. den., sub nom., *Lorraine Castle Apartments Building Corporation Inc. v. Mackintosh*, 326 U. S. 728 (1945). In *American Power and Light Company*, H. C. A. R. No. 6176, p. 4 (1945), where the Commission held that it would be unfair to retire the company's debentures at less than the redemption price, it appeared that the debentures were issued to the public for as low as $89.

tions as affected by a variety of political and social events are at best remotely relevant to the determination of present values. It was admitted by Mr. Benjamin that "the present condition of a company is more important than what has happened in the past" in determining the value of its securities (R. 590a). Moreover, past market prices are not only unreliable as a test of current investment value but actually can give a false picture. For example, in 1941 when Engineers' preferred ranged between $70-$85, the breakup value of the underlying securities, even during a depressed market, was estimated at $169 per share. *Engineers Public Service Co.*, 9 S. E. C. 84, 88 (1941). It is a known fact that holding company securities generally sell below the value of the common stocks which underlie them and it should be remembered that the market prices were seriously affected by the depression, the adverse publicity surrounding enactment of the Act, and the Engineers' management's procrastination. In spite of these adverse factors, during much of the time the Company was proposing to retire the preferred at only $100 per share, the stock was selling at close to the call price.[137]

If past market prices are to be given any weight, it should be pointed out that under the management's program of retiring the preferred at a discount there was the incentive and the ability to shape the conduct of the corporation's affairs so as to encourage public sales at low prices. The Commission recognized this

[137] The District Court attributed these high prices to "substantial" purchases by Engineers of its own preferred stock. Finding No. 29, R. 304a. Actually the Company purchased 37,500 shares over a period of 5 years and the total purchases amounted to less than 1% of the preferred stock outstanding. R. 303a, 304a.

possibility in the *Western* case,[138] when it pointed out that the Company had created complete uncertainty as to the management's policies with respect to compliance with Section 11. The Commission's opinion noted that:

> "* * * The continued existence of these uncertainties may well have had and continue to have an effect upon the market for the company's preferred stocks."

Assuming *arguendo* that issue and market prices are independently significant, comparative analysis in these respects of both the common and the preferreds would be highly appropriate and enlightening. On the basis of an average issuance price of $30.40 per share for the common (R. 1820a) and testimony as to the undisputed combined worth of Virginia, Gulf States and El Paso of at least $109,000,000 (R. 981a, 982a) by Barnes, President of Engineers, and after contribution of an additional $11.50 per share by the common to obtain all the underlying assets in these companies, the common will have obtained an interest in the enterprise worth $57 for each $41.90 contributed. Thus even on the District Court's premise, there is inadequate basis for its conclusion. Moreover, the market history of both the common and the preferreds are comparable. Although we dislike to dignify the importance of past market prices, we note that the common stock has had a much more volatile history

[138] 12 S. E. C. 804, 812 (1943). In *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194, 204-5, rehearing denied 332 U. S. 783 (1947), Mr. Justice Murphy pointed out management's ability to affect market prices:

> "* * * The broad range of business judgments vested in Federal's management multiplied opportunities for affecting the market price of Federal's outstanding securities * * *."

than the preferreds. While the preferred reached a high of $123 per share in 1929 and a low of $10 1/8 in 1935 (R. 302a), the common reached a high of $79 5/8 in 1929 and a low of $1 1/8 in 1935 (R. 305a). It appears that since 1932 there have been relatively few periods when Engineers common stock has shown a market value in excess of $10 per share (R. 543a). In 1942 the stock sold as low as $1.25 (R. 452a) and between 1942 and 1945 the stock has had a turn-over of almost 300% (R. 903a). Small wonder it is that the Commission did not attribute much weight to market history.

(b) *Retention of earnings.*

The investment value of the preferred stocks has been attributed erroneously to the retention of earnings over a period of years which might otherwise have been paid out as dividends to the common stockholders (R. 291a, 308a-309a). In the first place it cannot be claimed that the dividends were withheld through any misconduct of the preferreds, particularly in view of the common stock voting control. Besides, without conceding the soundness of the District Court's finding in this respect, there would seem to be no basis for assuming that the retention of earnings resulted in an *increased* value of the preferred stocks and a *decreased* value for the common stocks; rather would the probable result be an increased value for both classes of securities. In all probability if the common had taken out all the earnings which

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139 The District Judge considered the "retained earnings" as "past sacrifices" of the common (R. 291a). That view lacks factual basis.

were available to it since 1932, they would have been eliminated from the enterprise now rather than the preferred stockholders. Moreover, this argument overlooks the fact that the rights of the stockholders are to be "measured not in terms of the situation created by the statute but rather in terms of the situation terminated by it"[140] and that "the treatment to be accorded the preferred stocks under a comprehensive plan depends upon the conditions existing at the time such plan is approved.[141]

Even assuming the earnings were available for dividend purposes, the record clearly shows that every reason for non-payment of dividends was attributable to a business need on the one hand, or to a result desired by the controlling stockholders, on the other. Moreover, the retention of earnings was not a "sacrifice" by the common despite the statement of the District Court. In the first place, necessity for establishing a reserve for losses in "investments" made by the common controlled management,[142] required the elimination of earned surplus in 1938 and reduced the capital represented by common from over $58,000,000 to $1,999,968. Under such circumstances it was prudent, if not essential, to build up some equity behind the preferred. Secondly, the management, in the interest of the common as a class, embarked upon a program of accumulating cash in order to retire the preferred piecemeal and at substantial discounts[143]

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[140] *United Light & Power Company*, 13 S. E. C. 1, 13, H. C. A. R. No. 4215, p. 13 (1943).

[141] *Western Public Service Company*, 12 S. E. C. 804, 814 (1943).

[142] The preferred stock had no voting rights unless two years' dividends were in arrears. R. 1415a.

[143] The Company over a period of years acquired 37,500 shares at substantial discounts. These purchases ceased only when the market price of the preferred exceeded $100. See R. 733a, 1519a, 1576a, H. C. A. R. No. 5484.

when it became apparent that Engineers would be required to reduce its capitalization.[144] In fact a deliberate policy of accumulating cash had been pursued so that the preferred stockholders could be ousted from the Company (R. 643a, 687a, 719a). A third and compelling motive for non-payment of dividends was the desire on the part of the handful of controlling stockholders to obtain capital appreciation of their investment rather than dividends which would have been subject to high federal income tax rates (R. 756a). By retiring the preferred out of earnings, which was the objective, substantial savings in taxes resulted. A strange kind of "sacrifice", to say the least.

(c) *Alleged losses from past divestments under the Act.*

The court below directed the Commission to consider and weigh into the calculation supposedly[145] "substantial losses which occurred to Engineers by

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144 See *Western Public Service Co.*, 42 S. E. C. 804, 812 (1943).

145 After disposing of Engineers' insubstantial contention to restrict the preferred to $100 because of the alleged *Puget Sound* "loss", supposedly caused by the Act, the Commission commented:

> "In passing, we should point out that we do not accept counsel's hypothesis that the *Act* has caused the asserted losses. In all of its divestments, Engineers has been free in its choice of methods, and, within limits, to choose the time for divestment. All sales have been negotiated by Engineers at arm's-length. If, as in the case of Puget Sound, the sale brought less than the carrying value on the books of Engineers, the indication is that the carrying value was excessive and not that the sales price was low. It is significant that the market price of Engineers' common when the plan was filed was the highest since 1932 and that the price has been rising steadily since 1942 when the program of simplification got under way. As shown in Footnote 45, *supra*, Engineers' common reached a low of 1⅛ in 1935. By 1945, when the plan was filed, it had reached a high of 37." (R. 72a, n. 55).

virtue of divestitures compelled by the Act" (R. 37). Even assuming *arguendo* that these losses can be traced and attributed to the operation of the Act, this requirement is in conflict with the *Otis* principle of "full priority" which, as indicated above, places primary stress on contract rights to earnings and assets. Furthermore, such re-examination is contrary to the policy underlying the doctrine of *res judicata* and creates an insuperable administrative burden, as will be demonstrated in more detail below at page 127 ff. The sales method of divestments was entirely a choice of the common stock management. In any event, there has been no complaint that these divested securities were dumped upon the market or that inadequate consideration was received at the date of their disposition. *North American Co.* v. *S. E. C.*, 327 U. S. 686, 709 (1946). It is also highly significant that if these same divestments had resulted in substantial profits instead of alleged "substantial" losses, the preferreds would not have been permitted to share in those profits on the premise undoubtedly that the preferreds' participation has been limited by the call provisions, even though the fair investment value of the preferreds would have been even higher than that found by the Commission, absent the call feature. Such a one way street for the benefit solely of the common stockholders could hardly be called fair. Besides the common stock management being in complete control could have easily compelled the preferred stockholders to "share" the alleged losses by proposing a plan which would have permitted the preferreds to continue their participation in the enterprise. This would then have been clearly within the ambit of this Court's decision in the *Otis* case and the preferreds would have received, instead of cash the

equitable equivalent of the rights surrendered, in the form of securities in the underlying companies. The preferreds were unable to secure this participation due to the fixed attitude of the common which sought at the same time to eliminate the preferreds at a bargain price and keep for the common stockholders all the benefits of the flourishing underlying operating companies, using the Act as a cloak to accomplish their true objective. They consistently and persistently contrived to eliminate the preferred from participation and to reserve to the common all of the advantages.[146] Can the common now be heard to complain that they suffered great losses when in fact the preferreds were prohibited from participating in these so-called losses.[147] Such assumed "losses" would have all been previously absorbed and in any event would have been reflected in the present values of the two classes of both preferred and common stock. It is also interesting in this connection that after these divestments, the company's assets as of January 30, 1945 aggregated $65,756,904 (R. 86a) as compared with assets in 1938 of only $60,909,703 (R. 1525a). Likewise it cannot be fairly urged that the alleged Puget Sound book losses on which the two courts below place special emphasis can be attributed to the operation of the Act. Puget had been a cancer in the system from the time of its acquisition in 1928 (R. 1663a). It consistently failed to earn its own preferred dividend requirements and Engineers, in 1938, voluntarily created a reserve of $35,000,000 to reflect the "depreciation" in this "investment". In

[146] R. 583a, 643a, 687a, 719a, 723a.

[147] The Commission found that the elimination of the preferreds was "highly beneficial" to the common stockholders (R. 69a).

1943, Puget was recapitalized[148] and by virtue of the application of the investment value theory, Engineers received 3% of the new common stock in the reorganized company. These securities were sold in 1944 resulting in a book loss to Engineers of $33,320,519 (R. 1608a). It is clear that the book figure itself had no relationship to actual value. *To weigh in this book loss would in effect restore values which had already been lost through the operation of economic forces contrary to the mandate of this Court in the Schwabacher case.* Moreover, various other extraneous considerations entirely divorced from the requirements of the Act motivated the management in its disposition of Puget at the time, such as tax consequences (R. 1833a).

The effect, moreover, of weighing the conjectural losses from divestments for the benefit of the common, as the court below directs, results in substance, in the subordination of the claim of the preferred to that of the common on the basis of such losses, even though the history of Engineers reveals no "spoliation, mismanagement and faithless stewardship" by the preferred.[149] The voting common, not the preferred, have occupied a position of complete control and the Company "has been free in its choice of methods, and, within limits, to choose the time for divestment" (R. 72a, n. 55). Accordingly, the subordination of the wholly innocent preferred stockholders would constitute a misapplication of the "Deep Rock Doctrine".[150] Nor do the public preferred stockholders in the instant case fall within the ban of the principle established by the Commission and sustained by

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[148] *Puget Sound Power & Light Co.*, 13 S. E. C. 226 (1943).

[149] *Pepper v. Litton*, 308 U. S. 295, 308 (1939).

[150] *Comstock v. Institutional Investors*, 335 U. S. 211 (1948), citing *Taylor v. Standard Gas & Electric Co.*, 306 U. S. 307 (1939) and *Pepper v. Litton*, *supra*.

this Court in *S. E. C. v. Chenery Corp.*, 332 U. S. 194 (1947), under which management insiders are limited to cost on their purchases of securities during a reorganization.

These views of the two courts below, apart from their intrinsic unsoundness, involve a shift in emphasis to factors entitled under the decisions to but little weight[151] and a veering away from elements such as current rights to earnings and assets which are entitled to primary weight.[152] It in effect seeks to restore "values * * * already lost under the operation of economic forces" in violation of the principle enunciated as follows in the *Schwabacher* case:

> ** * * Public regulation is not obliged and we cannot lightly assume it is intended to restore values, even if promised by charter terms, if they have already been lost through the operation of economic forces.* Cf. *Market Street R. R. Co.*

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[151] Most of the arguments of the District Judge (Leahy, *J.*) are merely those advanced by Commissioner Healy in his dissenting opinion in *American Power & Light Co.*, H. C. A. R. No. 6176, plan enforced (S. N. N. Y. 1945), and those presented to the Commission by counsel for Engineers in support of its original plan. All four Commissioners (Commissioner Healy had died) found no substance in the arguments because they are based on fallacious assumptions: (1) there was no showing that the Act caused any losses; (2) the common stock was not getting "what was left" but was getting full compensatory treatment in order of its priority; (3) the common stock was not being "burdened" but was getting rid of the preferred and its prior claim on earnings; (4) the common stock had not "sacrificed" but had merely built up the value of its equity. Moreover, Judge Leahy ignored the fact that the preferred was actually the loser because the favorable dividend rates which the court termed "excessive yields" are impossible to duplicate.

[152] *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. R. Co.*, 318 U. S. 523 (1943); *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 632 (1945); *Lahti* v. *New England Power Ass'n*, 160 F. (2d) 845 (C. C. A. 1, 1947); *Phillips* v. *S. E. C.*, 153 F. (2d) 27 (C. C. A. 2, 1946), cert. den. 328 U. S. 860 (1946).

v. *Commission*, 324 U. S. 548. In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter made to him but the *current worth* of that promise that governs, it is not what he once put into a constituent company but what value he is contributing to the merger that is to be made good" (334 U. S. 199). (Italics ours.)

Accordingly, the Circuit Court's application of the standard of "All pertinent factors and all substantial equities" constitute a misinterpretation of the fair and equitable standard as enunciated in the *Otis* and *Schwabacher* cases. Moreover, its substitute criteria, under which the extent of participation is measured by irrelevant factors extrinsic to the contract rights of the security holders, afford no rational basis for the administration of the Act upon a uniform national scale and will necessarily create a lack of uniformity in view of its dependence upon determinations of the weight of various intangible factors by different enforcement courts all over the country.

2. The court below erroneously applied a standard of valuation "as if the Act had never been passed".

The court below also states that "No particular, specific approach [to the problem of valuation] is to be nailed to Commission's head" and suggests that an approach either "*intra* the Act" or "*ex* the Act" could "lead to just and appropriate valuations" (R. 37). Such choice of alternative methods of valuation is erroneous and contrary to the opinions of this Court in the *Otis* and *Schwabacher* cases. If an appraisal "*intra* the Act" should require the rights of the security holders to be measured in terms of the situation created by the statute, *i. e.*, as though a liquidation were

taking place and not in terms of the situation terminated by it,[153] that concept would run counter to the *Otis* case under which the preferred and the common were given the equivalent of their participation "as though in a continuing enterprise instead of in liquidation". Under the *Otis* case, neither is permitted to take advantage of a situation created by Congress to secure a benefit at the expense of the other, and both are held to the value of their bargains *inter sese* without reference to the liquidation or reorganization process in accordance with the policy expressed in the *Otis* case. The approach "*intra* the Act" requiring valuation as if the liquidation pursuant to the Act falls within the coverage of the charter liquidation provisions would violate the *Otis* rule of "inoperativeness", discussed *supra* at page , Moreover, the foregoing interpretation of "*intra* the Act" would appear to be contrary to the Circuit Court's statement that the charter provisions are "not dispositive of the issues presented" (R. 34).

Even assuming the proper application of the *Otis* rule of "inoperativeness", in view of the Circuit Court's express statement in this connection, the phrase "*intra* the Act" would seem to imply valua-

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[153] This statement is the converse of a quotation from the opinion of the *Commission in United Light and Power*, H. C. A. R. No. 4215, p. 13 [13 S. E. C. 12] (1943), which appears as follows in the opinion of this Court in the *Otis* case:

> "'Under the circumstances, fair and equitable compensation will be given to all of the claimants if their rights are measured not in terms of the situation created by the statute but rather in terms of the situation terminated by it—*i. e.*, as though no liquidation were to take place. In this way each class of stock will be accorded its proportionate share of the benefits to be gained from the elimination of a useless and expensive corporate entity and from the receipt of a security representing a more direct investment in the underlying assets and earnings of the system.'" (323 U. S. 635, n. 17).

tion "as if the Act had been passed"[154] or the converse of the phrase "*ex* the Act" as defined in at least one place in the opinion of the court below to mean valuation "as if the Act had *never* been passed" (R. 35).

This significance of "*intra*" and "*ex* the Act" appears to require an historical review of the past 10 years' activities in the Engineers' system and the public utility industry, so as to record and appraise the effects of the operation of the Act since its passage and to reconstruct Engineers on that basis. A retroactive adjustment of benefits and detriments (or profits and losses) so as to eliminate or cumulate the effects of numerous orders of the Commission,[155] interspersed among a variety of independent and possibly unrelated causal factors as the economic, political and scientific forces of the times, creates an infinite assignment impossible of fulfillment and imposes an overwhelming burden upon the Commission, in its administration of the Holding Company Act. Besides, in suggesting a re-examination of divestments and other transactions executed pursuant to the Act, it constitutes a collateral attack on the salu-

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[154] It may be that such interpretation of the expression merely harks back to the following quotation from the opinion of the District Court to which the court below refers as "the greatest difference between the respective approaches of the court and the Commission to the problem of valuation":

> "* * * 'I do not consider the argument advanced [by the Commission] as to what these series of preferreds would be worth if there were no Public Utility Holding Company Act. I do not think it profitable to consider an argument based on unreality *for there is a Public Utility Holding Company Act.* Unless one subscribes completely to the doctrine of foreordination things might always be different from what they are' * * *" (R. 20).

[155] For a list of significant orders of Commission which affected the Engineers' system see R. 69-70.

tary policy underlying the doctrine of *res judicata*,[156] upon final decisions, such as the *Puget Sound* divestment, in which the plan proposed by a common stockholder management has already been enforced by the United States District Court for the District of Massachusetts.[157] Hindsight review of the effects of numerous other valid orders would thus be required. Lastly, a valuation "*ex* the Act", predicated upon the aforesaid historical analysis, is not reconcilable with the "current worth" rule of the *Schwabacher* case and the "going concern" doctrine of the *Otis* case. In other words, the phrase "*ex* the Act" must mean "apart from the reorganization compelled by the Act", or "on the basis of a going business and not as though a liquidation were taking place", in the language of the *Otis* case as applied by the Commission. As this Court said in the *Otis* case: "* * * when the Commission proceeds in the simplification of a holding company system, the rights of stockholders of a solvent company which is ordered by the Commission to distribute its assets among its stockholders may be evaluated on the basis of a going business and not as though a liquidation were taking place" (323 U. S. 633).

3. The court below erred in requiring dollar valuation of the common stock interest where the preferred stockholders receive cash and the common stockholders, by choice, received the residual assets.

The court below, having apparently misconceived the meaning of "*ex* the Act" as indicated above, unjustly criticized the Commission for allegedly adopt-

[156] *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948); *Sherrer* v. *Sherrer*, 334 U. S. 343 (1948).

[157] *Puget Sound Power & Light Co.*, 13 S. E. C. 226 (1943), plan approved and enforced, civil action No. 2308 (D. Mass. 1944).

ing inconsistent techniques or methods in valuing the preferreds "*ex* the Act" and the common "*intra* the Act". In reality the Commission valued both the common and preferreds "*ex* the Act" or apart from the reorganization in accordance with the principles enunciated in the *Otis* case. Applying the doctrine of full priority, the Commission first valued the preferreds, and consequently, in valuing the preferreds apart from reorganization or on a going concern basis, necessarily reciprocally valued the common, by the same standard. In other words, since the total enterprise is to be divided between two claimants, the preferreds and the common, once the preferreds have been valued on a going concern basis and that value subtracted from the total, it appears obvious that the residual value is thereby established for the common, on the same basis. The preferreds are entitled, according to the Commission, to amounts at least equal to their redemption prices as the equitable equivalents of the rights surrendered,[158] and the common entitled, in exchange for their rights, to the remaining assets or the securities in the operating companies, there being no need to place a dollar value on the securities thus received in exchange.[159] The record is abundantly

[158] Common stock management selected the type of distribution (*i. e.*, cash for the preferreds and underlying securities for the common). The preferreds were not permitted to participate or retain a stake in the continuing enterprise in any form whatsoever (including the underlying securities) as the common stock management wanted to retire or treat the preferreds otherwise (R. 719a). Likewise, the initiative in suggesting the most appropriate method of complying with the Act from among the available alternatives is left to the Company management. *In the Matter of North American Light and Power Co.*, not officially reported (C. C. A. 3, 1948), printed opinion, p. 13.

[159] Full compensatory treatment may properly be made in either cash or securities by both the I. C. C. and the Commission. *Standard Gas & Electric Co.*, 151 F. (2d) 326 (C. C. A. 3, 1945);

[Footnote continued on following page.]

clear that the common stockholders were determined to secure for themselves all of the underlying securities, to the exclusion of the preferred who were denied the right to participate in the underlying operating companies unless, perchance they owned common stock, or could possibly acquire some Gulf States warrants.

The Commission, in determining fair and equitable treatment for the preferred in the instant case, has applied the usual technique in valuing senior securities, such as bonds, upon retirement unaccompanied by the liquidation or dissolution of the particular holding company.[160] In both situations, namely, the elimination of the preferred in the instant case and the retirement of bonds, a dollar value is placed upon these senior securities, while the junior securities or the common stock receive the residual assets, consisting of securities in the operating companies as in the instant case. The same result is achieved by the common stockholders' acquisition of the complete ownership of the holding company enterprise in the situation where retirement of the senior securities occurs without dissolution. Therefore, the Circuit Court's criticism that the Commission "made no finding as to the 'value' of the common stock" is without

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[Footnote continued from preceding page.]

Georgia Power & Light Co., H. C. A. R. No. 5568, plan enforced (M. D. Ga. 1945); *New York, N. H. & H. R. Co.*, 147 F. (2d) 40, 47 (C. C. A. 2, 1945), aff'g 54 F. Supp. 595, cert. den. 325 U. S. 884 (1945); *Chicago Railways Co.*, 160 F. (2d) 59 (C. C. A. 7, 1947).

[160] The analogy is clear when the Engineers' plan is viewed as embracing two separate phases or transactions, (1) the retirement of the preferred stock, and (2) the subsequent dissolution of Engineers, resulting in the distribution of securities in the underlying operating companies to the common stockholders.

substance.[161] The Commission has stated in detail the very reasoning upon which it based its conclusions.[162] The Commission merely did not place a dollar sign on the rights surrendered by the common[163] but has expressly found that the "plan is fair to the common stockholders" and that the "retirement of the preferred stock will be of immediate benefit to the common stockholders". Hence the Commission has determined that the residual value of Engineers, namely the securities in the operating companies received in exchange, is the equitable equiva-

[161] No such absence of a finding of value for the common was mentioned by the District Judge. Moreover, this same Circuit Court recently gave whole-hearted approval to the Commission's valuation despite the absence of any "'attempt to fix a precise dollar value for each [inter-company] claim'" and "findings and conclusions as to (a) the value and extent" of the assets and debts and senior security claims against such assets, and "the shares and relative rank of common stock entitled to participate in the remaining net assets". *In the Matter of North American Light & Power Co.* (C. C. A. 3, Nov. 5, 1948), unreported, printed opinion, pp. 7, 10. In this latter case, the Third Circuit Court quoted with approval the Commission's statement of its approach in weighing the inter-company claims as "'integral elements of the "bundle of rights" of the respective claimants in order to determine whether the plan achieves a fair and equitable distribution.'" In sustaining the Commission, the Circuit Court concludes:

> "* * * The Commission has determined that the settlement was for the best interests of the parties; that the amount stated in the Amended Plan is both fair and equitable. They are ultimate findings, and represent a judgment based upon the consideration of all the imponderables involved in determining whether the proposed offer met the requirements of being fair, reasonable and adequate.' *Ladd* v. *Brickley*, *supra*. In point of fact, the Commission has gone further, and has stated in complete form the very reasoning upon which it based its conclusions. We think that is enough." (Printed Opinion, pp. 17-18.)

[162] See *In the Matter of North American Light and Power Company*, *supra*, printed opinion, p. 18.

[163] As stated in the *Standard Gas* case: "Actually it was not incumbent upon the Commission to reduce the result to dollars and cents in the process of valuation" [151 F. (2d) 333, n. 12].

lent of the rights surrendered by the common. In such a case, a distribution may properly be made without dollar valuation. *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. R. Co.*, 318 U. S. 523, 565 (1943); *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 482 (1943); *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 639-40 (1945). A requirement that dollar values be put upon the rights surrendered and the *quantum* received "would create an illusion of certainty where none exists and would place an impracticable burden on the whole reorganization process." *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. R. Co., supra*, at p. 565. Practical adjustments are required rather than a rigid formula. Accordingly, such determination need not be made by the use of any mathematical formula or with mathematical certitude. *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. R. Co., supra*, at pp. 565-6; *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 529-30 (1941).

4. The court below improperly directed the Commission to give greater consideration to earning power and to apportion it.

A further criticism has been erroneously directed by the court below at the Commission on the basis of the *DuBois*, the *Group of Institutional Investors*, and the *Otis* cases for its alleged failure to "give any substantial consideration to the future earning power of Engineers and its subsidiaries", and its asserted neglect "to ascertain the future earning power of the system" or "apportion earning power between the preferreds and common based upon their respective claims to income" (R. 35).[164] Reference to these cases

[164] Apparently the District Court disagrees with the Circuit Court in this respect as the District Court nowhere in its opinion refers to any inadequate consideration of earning power.

reveals that in each, the reorganization involved the formation of a *new* corporation and the appropriate allocation of the securities therein on the basis of the apportionment of the earning capacity among the claimants. Hence earning capacity was projected far into the future and ascertained in order to insure the ability of the new corporation to meet the interest and dividend requirements of the new securities as a "sine qua non to a determination of the integrity and practicability of the new capital structure", and in order to avoid the "indefensible participation of junior securities in plans of reorganization" in violation of the well established "absolute priority" rule.[165] It would therefore seem that the criticism of the court below reflects a misapplication of the principle of these cases since the instant case, in contrast to the decisions cited by the court below, involves an entirely different type of distribution and method of compliance with the Act. In the instant case, the common stock management decided upon the complete elimination of the preferred class as the method, and cash as the type of distribution, instead of the formation of a new corporation, upon the dissolution of Engineers and the allocation of securities therein. Nor is the "indefensible participation of junior securities" at issue. Accordingly, the criterion of earning capacity, which was originally fashioned as a shield to protect the preferred from "indefensible participation" of the common in a new corporation "in satisfaction of the absolute priority rule" has by the court below been converted improperly into a weapon in the hands of the common against the preferred in disregard of the aforesaid rule. In effect the court below

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[165] *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510, 525-6, (1941).

has attempted to restrict the preferred by its misapplication of the doctrine of full priority. Moreover, in view of the material differences, particularly with respect to the type of distribution and method of compliance with the Act, between the instant case and the cases cited by the court below in support of its criticism, there is no need for a hypothetical projection into the indefinite future of the earnings capacity nor for an apportionment thereof. Yet it is evident from Badger's analysis, that in his opinion the estimated 1946 earnings indicated a continuation in earnings shown for the 1940-5 period, that future earning trends of Engineers' subsidiaries should not run counter to the strong growth trend of the public utility industry as there were no peculiar economic characteristics in respect to the territories served by these companies, and that Engineers should continue in future years to register progress along with other units in the industry (R. 2103a). Thus, in the instant case, *actual* as well as estimated earnings were considered, although, where, as here, a careful study indicates the amplitude of earnings coverage for the preferred, it does not appear necessary to go further as the common's claims to income would be subordinate, in any event, to those of the preferred stockholders. "The extent and method of inquiry necessary for a valuation based on earning capacity are necessarily dependent on the facts of each case." *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 527 (1941).

5. The court below misconceived the significance of fair investment value.

In addition, the court below has unjustifiably found fault with the Commission for attempting to substitute "the new doctrine of investment value * * * for the

doctrine of equitable equivalents enunciated in the *Otis & Co.* decision",[166] and maintains that "investment value is and can be only one of a series of factors to be used in arriving at equitable equivalents". Despite the statement of the court below, novelty cannot be ascribed to the investment value doctrine in view of its recognition by this Court in the *Otis* case. There it was pointed out that once it is concluded, as it has been here, that the dissolution results in a type of liquidation entirely distinct from the liquidation envisaged by the charter provisions, the Commission is permitted "to examine the investment values of the

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[166] Certainly novelty is not revealed in the following rationale in the Commission's decision in the instant case:

> "It is settled that in a Section 11 reorganization a security holder must receive, in the order of his priority, from that which is available for the satisfaction of his claim, the equitable equivalent of the rights surrendered. Since under the circumstances of this case, we do not think it proper to regard the liquidation provisions of the charter as conclusive in determining those rights, we must consider all provisions of the charter applicable to the preferred, such as the dividend rate and the call price as well as the liquidation preferences, and we must analyze the financial condition of the company with particular regard to the asset and earnings coverage of the preferred" (R. 62a).

After reviewing the financial data and expert testimony the Commission concluded:

> "It is apparent that the preferred has an investment value at least equal to the respective call prices. * * *
>
> "Upon a full consideration of the record * * * the fair and equitable standard would require the payment [to the preferred] of an amount equal to the call prices of the securities, plus accrued dividends * * *": (R. 67a-68a).

It is significant that the report of the Senate Committee on Interstate Commerce, in reviewing Section 11 of the Senate bill on the Public Utility Holding Company Act, states: "Precedents under the Sherman Antitrust Act and under the Hepburn Act demonstrate that the necessary corporate adjustments can be made without forced liquidation or the sacrifice of *legitimate investment value*." S. Rep. No. 621, 74th Cong., 1st Sess., p. 33. (Italics ours.)

common and preferred stock". In reality, the doctrine of investment value connotes no novel technique but reflects the *measure* of the stockholders' rights determined in the simplification of a holding company system on the "basis of a going business", as recognized in the *Otis* case.

It has been a settled principle at least since the *United Light & Power Co.* case, 13 S. E. C. 1 (1943)[167] (the original *Otis* case) that has been continuously applied by the Commission[168] and recently reaffirmed in another aspect of that simplication,[169] that the present investment worth of a security, based on the bundle of rights surrendered, must be the measure of its participation in a section 11(e) plan. This concept[170] has recently been approved in an analogous situation in the *Schwabacher* case, *supra*, where this Court stated: "In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter made to him but the *current*

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167 In the words of the Commission: "It is our conclusion that we must judge the fairness of the plan according to legitimate investment values existing apart from the duty of liquidation imposed by the statute" (13 S. E. C. 11). The Commission then proceeds to a discussion of the "bundle of rights" affecting normal value.

168 *E. g., Washington Railway & Electric Co.*, H. C. A. R. No. 7410 (1947), enforced June 16, 1947 (D. C. Dist. of Col.); *Pennsylvania Edison Co.*, H. C. A. R. No. 8550 (1948).

169 *United Light & Power Co.*, H. C. A. R. No. 6603 (1946).

170 This investment value doctrine has recently received judicial sanction in the First Circuit in *In re American and Foreign Power Company*, 80 F. Supp. 514, 528 (D. Me., 1948), where the District Court said with reference to the values assigned to certain preferred stocks under a section 11(e) plan:

> "• • • But it is clear that the Commission arrived at these figures not from a conception that this was a 'call' but from a *consideration of what was the fair investment value of these stocks*, in accordance with the overriding policy of *Otis & Co.* v. *S. E. C.*, 323 U. S. 624." (Italics ours.)

worth of that promise that governs, it is not what he once put into a constituent company but what value he is contributing to the merger that is to be made good" (334 U. S. 199). (Italics ours.) The analogy to the instant case is borne out by this Court's own recognition in the *Schwabacher* case of "the very similar purposes" of the Holding Company and the Interstate Commerce Acts and its reaffirmation of the *Otis* "rule of full priority" as embodied in the fair and equitable standard. Moreover, the doctrine of "current worth" is applicable, regardless of the method of system adjustment in view of the admonition in the *Otis* case that such incidents of simplification should not affect rights. It is immaterial that the Interstate Commerce Act expressly limits the types of recapitalization while the Holding Company Act does not, since in both situations, valuation is to be determined on a going concern basis.[171]

In short, present investment value or current worth is not a substitute for equitable equivalent, but its measure. It is not "one of a series of factors" to be used in the valuation, but is the end result, the final product of the valuation process based on the bundle of rights surrendered and reflecting earning power, market history, dividend record, asset priorities, and other relevant factors,[172] all of which the Commission has taken into account in arriving at equitable equivalents. Such criteria provide a proper basis of valuation. *Consolidated Rock Products Co. v. Du Bois*, 312 U. S. 510, 526 (1941).

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171 The similarity in the two statutes in another related aspect of the reorganization process is noted in *In the Matter of North American Light & Power Co.*, not officially reported (C. C. A. 3, 1948), printed opinion, p. 15.

172 Dr. Badger took all these elements into consideration in arriving at his values (R. 2097a).

6. The court below erred in distinguishing the *Otis* case on the basis of the continuance of the enterprise.

In addition, the court below erroneously criticized the Commission for its alleged disregard of what it conceives to be a substantial difference between the instant case and the *United Light and Power* reorganizations, namely, the termination of the holding company enterprise both for the preferreds and the common in the former and the continuance of the holding company enterprise in the latter, there being merely a shift of "the security holder participation in the enterprise * * * from the top holding company * * * to a subsidiary holding company". Thus the court below approves the district court's valuation in the instant case "of the securities '*ex* the Act', considering the holding company enterprise to be at an end as it is in fact" (R. 36). This attempted distinction is not valid and in fact represents a lateral, rather than a frontal attack upon the *Otis* principle that the charter liquidation provisions are controlling regardless of the type of liquidation involved. Granting *arguendo* that the present Engineers' plan is a "real liquidation" (as contrasted with a "nominal liquidation") then the claimed distinction disregards the admonition of this Court in the *Otis* case: "*The reason* [for its decision] *does not lie in the fact that the business of Power continues in another form.* That is true of bankruptcy and equity reorganization". (Italics ours.) In fact, the Commission viewed the dissolution in the *United Light & Power* (*Otis*) case as an actual dissolution and not merely the "peeling" off of a company in a holding company system.[173] In any

[173] In the reorganization of Puget Sound Power & Light Co., a former subsidiary of Engineers', the Commission referred to its views in the *United Light & Power* decision (13 S. E. C. 1, H. C. A. R. No. 4215) (1942) as follows: "These views were expressed in the course of our discussion of a proposal which contemplated an *actual liquidation*" [13 S. E. C. 226, 246 (1943)]. (Italics ours.)

event, a "real liquidation" of the enterprise has not occurred in the instant case, for the business of Engineers' continues in the operating companies which are now owned directly by the common stockholders instead of indirectly, since the elimination of Engineers (R. 1397a). In *American Power & Light Company* v. *S. E. C.*, 329 U. S. 90, 117 (1946), this Court has pointed out that the dissolution of a holding company means little more than the receipt of securities of the operating company in lieu of their present shares in the holding company.[174] Furthermore, the reasoning of the court below leads to the absurd result, that if Engineers, even though allegedly economically useless, had merged with one of its subsidiaries as originally contemplated, the holding company enterprise would have continued. Such a flimsy distinction[175] must be rejected as unsound.

Thus, the view of the court below when carried to its logical conclusion[176] results in improper emphasis

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[174] The Company itself indicated to its stockholders that the results of the plan would be to give them direct ownership of the subsidiaries. See *North American Co.* v. *S. E. C.*, 327 U. S. 686 709 (1946).

Also see *Northern States Power Co.* (Del.), H. C. A. R. No. 5745, p. 21 (1945), where the Commission appropriately said: "While the plan contemplates a formal dissolution of Delaware as a separate corporate entity, the *actual business enterprise* represented by the securities of Delaware, is being continued." (Italics ours.)

[175] Cf. *Community Gas & Power Co.*, 168 F. (2d) 740, 743 (C. C. A. 3, 1948). This same Circuit Court apparently distinguishes between a going business "destined to continue" and "an enterprise which is terminating". The distinction is lacking in merit where the termination of the enterprise is compelled by the operation of the Act. In the instant case, Engineers' counsel argued that the Company would have continued into the future for many years, but for the Act (R. 61a n. 42).

[176] It would seem from the opinion of the court below that the *Otis* rule would be applied to the first of these two holding companies but not to the liquidation of the second, since no holding

[Footnote continued on following page.]

upon the procedural sequence of simplification, even though, as this Court has said in the *Otis* case, values should not "be made to depend on whether the Commission, in enforcing compliance with the Act, resorts to dissolution of a particular company in the holding company system, or resorts instead to the device of merger or consolidation". Procedural decisions, such as the selection of a particular sequence in or method of system adjustment (especially since in the case at bar the choice has been made by the common stock management of Engineers) (R. 718a, 719a), should not affect rights.[177] So said this Court as follows in the *Otis* case:

> "* * * Satisfaction of the great-grandfather clause might have been obtained in this or other holding company systems by an order for merger, consolidation or recapitalization between top holding companies or between associate companies

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[Footnote continued from preceding page.]

company system remains after the liquidation of the second. Such result could hardly be justified as fair and equitable when each holding company has separate groups of stockholders whose interests are accorded different treatment although both companies were dissolved because of the Act. The sequence of liquidation of a particular company in a holding company system should not affect rights.

[177] Under section 11(e) of the Act, the choice of an appropriate method of compliance from available alternatives is left by the Commission to the company or as in the instant case to the common stock management of Engineers. *Commonwealth & Southern Corp.* v. *S. E. C.*, 134 F. (2d) 747, 751 (C. C. A. 3, 1943); *In the Matter of North American Light and Power Co.*, not officially reported, printed opinion, p. 13 (C. C. A. 3, 1948); *The United Corp.*, H. C. A. R. 8396 (1948). The dominant role of management in the presentation of a plan is clearly recognized in the *North American Light and Power* case, *supra*, where the Third Circuit Court said: "* * * Since the *modus operandi* of Section 11(e) provides for a unilateral plan by management, it would be in naive disregard of human instinct to assume that such plans would, in every instance, be free of the influence of dominating interests." (Printed Opinion, p. 13.)

in the lower tiers of the corporate hierarchy. Such procedure would avoid the liquidation of Power. * * * *The selection by the Commission of one method of system adjustment to accomplish simplification rather than another is an incident which ought not to affect rights*" (323 U. S. 631). (Italics ours.)

Likewise any inference from the views of the court below that the applicability of the *Otis* case depends upon the continuation of the underlying holding company system (which was the fact in the *United Light & Power* reorganization) does not stand analysis. The *Otis* rule has in fact been applied in simplification proceedings under section 11, regardless of whether or not there has been a continuing holding company system.[178] Moreover, the emphasis upon the continuation of the holding company system places a premium upon the sequence of simplification and makes stockholders' rights contingent upon the procedure of system adjustment. But such procedural decisions should not affect rights any more than the selection of a particular method of system adjustment, as this Court cautioned in the *Otis* case.

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[178] For example, in *Puget Sound Power & Light Company*, 13 S. E. C. 226 (1943), Puget Sound had no holding company system beneath it when Engineers filed the plan for it. Also in *Southern Colorado Power Co.*, H. C. A. R. No. 4501 (1943), enforced in Civil Action No. 670 (D. Colo., 1944), aff'd *sub nom.*, *Disman* v. *S. E. C.*, 147 F. (2d) 679 (C. C. A. 10, 1945), cert. den. 325 U. S. 863 (1945), the holding company interest was wiped out so that Southern Colorado was no longer in a holding company system.

C. The Commission Applied the Proper Standards and Techniques in the Valuation Process. Its Findings Should Have Been Sustained Since Based Upon Substantial Evidence and Possessing Rational and Statutory Foundation, and in Any Event They Were Not Capricious.

In determining the participation of the preferred, the Commission, as urged above, has applied the correct standards and techniques in the process of valuation. Under the applicable principles, such participation is measured by the present worth of the security, based upon the bundle of rights surrendered, and valued as though in a continuing enterprise, with primary emphasis upon the current rights to earnings and assets. *Otis & Co.* v. *S. E. C.*, 323 U. S. 624 (1945). That process requires "expert analysis and the weighting of a complex array of factors, in which the informed judgment of the Commission counts heavily". *Lahti* v. *New England Power Ass'n.*, 160 F. (2d) 845 (C. C. A. 1, 1947). The appraisal of these factors calls for the exercise of an expert economic judgment as to "current worth" of the contract rights. *Schwabacher* v. *U. S.*, 334 U. S. 182 (1948). The Commission's determination has "substantial roots" in the law and in the facts, *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S. 469, 478 (1947), and is not capricious (as the two courts below apparently believed).

Viewing the charter liquidation provision as not "conclusive" in determining the equitable (economic) equivalent of the rights surrendered, the Commission considered "all provisions of the charter applicable to the preferred, such as dividend rate and call price as well as the liquidation preferences" and carefully analyzed "the financial condition of the company with

particular regard to the asset and earning coverage of the preferred" (R. 62a). It appeared that the preferred stock of Engineers represented 17.5% of corporate capitalization and surplus, is junior to 66.2% and senior to 16.3% (R. 64a). For the period 1940 to 1945, the average coverage of fixed charges and dividends was 1.4 times, and for the same period, preferred dividend requirements on a corporate basis had been earned an average of 1.5 times (R. 64a). Reliance was placed on the testimony of Badger, an expert witness, as well as Barnes, President of Engineers and other Company officers. Badger prepared an extensive report analyzing the values of the three series of preferred stock (R. 2056a *et seq.*). He examined the history of Engineers, the records in respect to the Company's property and its business, the management, the asset position, the earnings and dividend record and other pertinent data relating to the going concern value of Engineers preferred stock. He ascertained that during the years 1940 through 1945 there was a continuous improvement in the Times Charges and Preferred Dividends earned, with the exception of 1945. In 1940, these charges were earned 1.22 times and increased gradually to 1.54 times in 1944. In 1945, charges were earned 1.47 times. If effect is given to the reduction in Federal Income and Excess Profits Taxes in that year, resulting from nonrecurring deductions, the figure becomes 2.12 times (R. 2099a). Preferred dividend requirements for Engineers alone, based on balances of earnings available for Engineers, were covered between 1.81 times and 3.2 times for the period 1940 through 1945. If extraordinary deductions of income taxes for 1945 is given effect the dividends would have been earned 4.75 times (R. 2101a). Based on the Company's own estimate of 1946 earnings (R. 1826a), Badger calculated that

over-all charges in 1946 would be earned 1.67 times and Engineers' preferred dividend requirements alone would be earned 3.39 times (R. 2102a). The estimate of 1946 earnings thus indicates a continuation of the improvement in coverages shown for the 1940-45 period. In that connection Badger also expressed the view that earning trends of Engineers' subsidiaries should not run counter to the strong growth trend of the public utility industry as there were no peculiar economic characteristics in respect to the territories served by these companies, and that Engineers should continue in future years to register progress along with other units in the industry (R. 2103a). After the analysis of earnings of Engineers he compared, on the basis of investment characteristics, Engineers preferreds with preferred stocks of five public utility holding companies which he believed to be similar to Engineers for the period 1940 to 1945 in order to ascertain their relative position and yield (R. 2108a). On the basis of a comparison of yields of the securities studied, he concluded that the $5., $5.50, and $6.00 had a respective average value of $107.49, $118.31 and $129.07 (R. 2112a). Badger also prepared a study of the preferred stock of ten operating and holding companies selected for similarity of their earnings to those of Engineers (R. 2113a). He found an average yield for the ten stocks selected of 4.5 and by an application of this yield to the $5.00, $5.50 and $6.00 preferreds, obtained their corresponding values of $111.11, $122.22 and $133.33 (R. 2114a). He concluded that a proper yield for Engineers preferreds would be 4.6%, resulting in respective fair investment values per share for the three series of $108.70, $119.57 and $130.33, absent the call features. In view of the redemption feature and a premium for a period

until call, it was his opinion that the three series had fair investment values of $106.25, $111.38 and $111.50 respectively (R. 66a-67a, R. 2118a). It also appears from the opinion of the Commission that "No additional expert testimony on value was introduced into the record and no serious challenge was made in the proceedings to Badger's conclusion that the fair investment value of the preferred on a going concern basis is in excess of the call price" (R. 67a). In fact, this view was substantiated by other testimony as that, for instance, by Barnes, President of Engineers (R. 522a). In the opinion of both witnesses the call price of the securities established a ceiling or "stopper" on their value.

The Commission found that the preferred has an investment value at least equal to the respective call prices and concluded, upon "full consideration of the record" before it, that "the fair and equitable standard would require the payment of an amount equal to the call prices of the securities, plus accrued dividends" (R. 68a). The Commission also found that "the retirement of the preferred stock will be of immediate benefit to the common stockholders" (R. 72a) and that "the plan is fair to the common stockholders" (R. 135a). The Commission considered comparatively unimportant such factors as issue prices and market history, alleged losses from divestments, etc. The appraisal by the Commission, which involves a discretionary weighing of a variety of factors, is based upon substantial evidence and has a rational basis in fact and is not predicated upon any clear cut error of law. In any event, its determination is not arbitrary or capricious but reflects the exercise of an informed expert economic judgment based upon the record.

This determination of the Commission should be considered as of the date of its approval, particularly as the District Court accepted Badger's values and "in the absence of a showing of changed circumstances", assumed "that they are applicable at the present time" (R. 2110a), although not considering them "controlling as the plan did not propose to give these amounts" to the preferred stockholders (R. 290a). In any event, the Commission's decision should be reviewed on the basis of the administrative record as of the date when the rights of the parties were fixed by virtue of the *actual* consummation of the plan pursuant to the District Court decree,[179] after the denial of the Streeter petitions for a stay by the two courts below and by a Justice of this Court. In that connection it should be noted that the dividend rights of the preferreds were terminated at that time and that the consummation of the plan led to the mooting of the appeals then pending before this Court with respect to the 11(b) divestment orders (R. 113, n. 1). In any event, no substantial or radical change has occurred which would require a reopening of the administrative record. Under such circumstances, the Commission's action should be tested on the basis of the administrative record which is the same both at the time of the Commission's and the District Court's action. Consequently, it is urged that the Commission's determination should have been sustained since it has a rational and statutory foundation and the Commission has not plainly abused its discretion, even though the District Court believed

[179] Cf. *Public Service Commission of N. Y. v. S. E. C.*, 166 F. (2d) 784, 788 (C. C. A. 2, 1948).

that greater weight should be given to certain elements all of which had been considered by the Commission. The court below therefore should have held that the decision of the District Court was clearly erroneous both in fact and in law.

IV. The Court Below Erred in Disregarding an Improper Change in the Plan and Approving Incorrect Procedure Used Therefor, Both Sanctioned by the District Court.

A. The Dividend Rights of the Preferred Stockholders Should Not Have Been Terminated Under a Fair and Equitable Plan Prior to Receipt of the Full Amount of Current Value of Their Stock as Limited by the Call Prices.

As heretofore related, the plan which was approved by the Commission and submitted to the District Court for enforcement provided for the retirement of the preferred stock at amounts equal to the respective call prices (R. 134a). Although the undisputed investment values of the preferred shares exceeded their respective voluntary redemption prices, the Commission treated the call prices as setting "a ceiling" and restricted the participation of the preferred stockholders to amounts at least equal to their respective call prices. In accordance with the redemption provisions of the charter (R. 1413a), under the provisions of the plan the dividend rights of the preferred stockholders could be terminated only upon payment of the full amounts to which they were entitled (R. 108a). We agreed with the Commission that this plan was fair and equitable and urged its enforcement (R. 158a).

The District Court, however, over our objections (R. 361a) changed the plan by its order so that the

dividend rights of the preferred stockholders were terminated upon the receipt of $100 per share, together with the creation of an escrow to cover the excess between $100 and the respective call prices plus an amount of prospective interest (R. 320a, 321a). Although holding that "the escrow provisions of the plan are proper" (R. 40), without discussion of the objections, the court below directed the District Court to enter an order disapproving the plan as the District Court had found the plan as submitted by the Commission unfair and inequitable. The court below also pointed out that in view of the denial of a stay of consummation, "the escrow agreement accordingly delimits the area in which the plan to be approved by the Commission and district court must fall" (R. 40).

Assuming but not conceding that the District Court had the power to rewrite the plan in the first instance,[180] it is our contention that the plan as changed is unfair to the preferred stockholders, particularly in the light of the Circuit Court's direction for the disapproval of the plan.

Although the *Otis* case held that liquidation preferences in the charter are "inoperative" under section 11 it did not hold that the redemption provisions are likewise inoperative. In fact, the Commission *applied* the redemption provisions when it restricted the preferred's claim to their respective call prices in spite of the undisputed testimony that the investment values were in excess of such prices.

The Commission stated the theory as follows:

"* * * We have indicated in previous opin-

[180] The Commission maintains that its Order of Amendment did not constitute an amendment to the plan (R. 389a).

ions that the call price will ordinarily set a ceiling on the value of a security, for it provides a means, apart from the Act, whereby the security can be retired at a maximum price." (R. 67a).

The District Court also applied the redemption provisions of the charter by permitting the consummation[181] of the plan and the creation of an escrow of the difference between $100 per share and the respective call prices plus an amount of prospective interest.[182] This the court below sustained, in spite of its direction for the disapproval of the plan. The effect of what the Commission and the two courts below did was to place a ceiling on the preferred's claim, which ceiling, absent the redemption provisions, would be nonexistent. *Continental Insurance Co. v. U. S.*, 259 U. S. 156 (1922). At the same time the two courts below permitted the termination of the preferred's dividends upon their receipt of $100 although under the redemption provisions the common stockholders did not have that right except upon the payment of the full call prices. Thus the common received the full benefits for which the charter required them to pay a premium, but without payment of the premium. On the other hand, the preferred suffered all the detriments which a call of the stock would have entailed but did not receive the benefits, *i. e.*, receipt of the premium.

The premature termination of the preferred's dividend rights under the circumstances herein is contrary to congressional intent. S. Rep. No. 621, 74th Cong.,

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[181] The plan has since been consummated except for the payment of the amounts in excess of $100 per share (R. 40).

[182] The escrow also included an allowance for expenses and for interest on the amount withheld from the preferred.

1st Sess., p. 33. In the course of its analysis of sections 11(d), (e) and (f), the Senate Report states: "If a company is *solvent*, the court should continue the payment of interest and in appropriate cases *dividends until a prudent reorganization is effected.*" (Italics ours.) An analogous principle has been applied to consolidations, reorganizations or liquidations under State law.[183]

It is no answer to say that the receipt of $100 plus the escrow was sufficient to protect the preferred. The weighted average dividend rate on all series of preferred was 5.37%. Dr. Badger testified that under present and reasonably foreseeable future conditions a return of only 4.6% could be obtained on a security equivalent in quality to Engineers' preferred. Thus the preferred as a class loses .77% on $39,245,500, the aggregate stated value of their stock, or $302,190 per year.[184]

Furthermore, the Escrow Agreement is unfair because it required the preferred stockholders to turn in their stock certificates, whereas the common stockholders retained theirs. Thus, the preferred stockholders have no indicia of ownership. Moreover, we found no other case where similar action was taken. In cases before and after the present one, the Com-

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[183] *Lonsdale Securities Corp.* v. *International Mercantile Marine Co.*, 101 N. J. Eq. 554; *Colgate* v. *U. S. Leather Co.*, 73 N. J. Eq. 72, rev'd on other grounds, 75 N. J. Eq. 229; *Wilson* v. *Laconia Car Co.*, 275 Mass. 435; *Garritt* v. *Edge Moor Iron Co.*, 22 Del. Ch. 142, aff'd *sub nom. Pennsylvania Co.* v. *Cox*, 23 Del. Ch. 193.

[184] Since the escrow makes provision only for interest on the excess over $100 per share, it is not adequate to protect the rights of the preferred stockholders in the event it is ultimately determined that they are entitled to amounts equal to the call prices.

mission and the courts have approved the issuance of certificates to the preferred stockholders.[185]

At all events, these elements present equities for the preferred which this Court may wish to weigh in the light of the circumstances of this case.

B. The Court Below Erroneously Sanctioned a Departure From the Statute and the Constitution in Permitting an Amendment or Modification of the Plan to Provide an Escrow Without Notice and an Opportunity to Be Heard.

As shown in our Statement the Commission, by *ex parte* action, approved the escrow arrangement (R. 170a) after the hearings before it had been closed. Objection was made (R. 181a) to the Commission's motion to amend its application to include its "Order of Amendment", because we had not been afforded an opportunity to be heard as to the adequacy of the Escrow Agreement[186] which had been submitted to the Commission. At the hearing on February 17, 1947 this version of the agreement was filed with the District Court, but after the hearing was closed a revised agreement[187] was sent to the District Court by counsel for Engineers.

On May 26, 1947, counsel for the Commission presented a proposed form of order embodying this revised Agreement (R. 422a). We objected (R. 372a)

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[185] See *Electric Bond & Share Co.*, 73 F. Supp. 426 (S. D. N. Y., 1946); *Eastern Minnesota Power Corp.*, H. C. A. R. No. 7441 (1947), plan enforced (D. Minn., 1947), C. C. H. Fed. Sec. Serv., Par. 90,399-1; *New England Public Service Co.*, H. C. A. R. No. 7511 (1947), plan enforced, 73 F. Supp. 452 (D. Me., 1947); *Pennsylvania Edison Co.*, H. C. A. R. No. 6723 (1946).

[186] R. 402a. This version was drafted on the theory that it would be utilized in case of an appeal by the common stockholders.

[187] R. 362a. This revised form was drafted to be used in the event of an appeal by either preferred or common stockholders.

again because we had not been afforded an opportunity to be heard as to its adequacy.

On May 29, 1947 the District Court over our objection entered the order from which an appeal was taken (R. 391a) and adopted the Escrow Agreement submitted by counsel for the Commission. An appeal was immediately filed and we moved (R. 333a) for a stay of consummation because of the amendment to provide an escrow and because of its inadequacy, but were denied relief (R. 335a). Likewise petitions for stay which were filed in turn with the court below and a Justice of this Court were denied. Implicit recognition of the merit of our request for a stay is found in the opinion below where the Circuit Court said: "The action which the Commission may take will, of course, be limited by the fact that with its approval, evidenced by its opposition to the appellant Streeter's motion to stay which this court denied, the plan has been carried into effect, with the exception of the payment of the premiums which the district court disapproved" (R. 39-40).

There was no precedent or justification for this irregular procedure. The Act requires an opportunity for hearing both before the Commissions and the Court. *American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90 (1946). Such opportunity to be heard is commanded by the procedural due process requirements of the Fifth Amendment to the Constitution: *Railroad Com. of Cal.* v. *Pac. G. & E. Co.*, 302 U. S. 388, 393 (1938); *Philadelphia Co.* v. *S. E. C.*, not officially reported, C. C. H. Fed. Sec. Serv., par. 90,426 (C. A., D. C., 1948). Neither the Commission nor the District Court acted in such arbitrary fashion in other instances. For example, in *American Water Works and Electric Company*, H. C. A. R. No. 7208 (1947),

the Commission approved a plan which included an escrow arrangement that had been proposed as a part of the plan and the Commission specifically reserved jurisdiction over the terms of any escrow agreement. Thus, all parties would be afforded an opportunity to be heard.

Moreover, in *Pennsylvania Edison Co.*, H. C. A. R. No. 6723 (1946), which was cited to the District Court by Commission counsel as a precedent for an escrow it appears that the Commission afforded the preferred stockholders an opportunity to be heard. Similarly, in *Eastern Minnesota Power Co.*, H. C. A. R. No. 7441 (1947), such opportunity was given before submission to the District Court for enforcement. A final illustration is the recent decision in *Federal Light & Traction Co.*, H. C. A. R. No. 7701 (1947), where as in all other instances, except the present case, the preferred stockholders received an opportunity to be heard on the escrow arrangement and were given transferable indicia of ownership pending ultimate disposition of their claims.

Regardless of the outcome, the preferred stockholders had a valuable right to be heard as to the terms of the escrow. Especially is this true, when, as shown above, the plan as modified by the District Court to termina e the preferred's dividend rights is not fair and equitable to the preferred stockholders. As stated in the *Phildalephia Co.* v. *S. E. C.*, *supra*, "Denial of a procedural right guaranteed by the Constitution * * * is never 'harmless error'."

V. Assuming *Arguendo* the Unfairness and Inequity of the Plan, the Court Below Properly Vacated the Decree of the District Court and Directed the Remand of the Proceedings to the Commission.

We have maintained that the Commission correctly determined that the preferreds have a fair investment value at least equal to the call prices and that fairness and equity require the payment to the preferreds of that amount. If, however, this Court concludes that the Commission erred in its valuation, then and only then the question of remand comes to the fore.

Assuming but not conceding the correctness of the District Court's determination "that because of the provision for the payment of premium,[188] the plan does not meet the requirements of fairness and equity" (R. 292a), nevertheless the District Court had no power to rewrite or amend the plan so as to reduce, on the basis of its own estimates and valuation, the *quantum* of participation accorded to the preferred stockholders under the plan submitted by the Commission, and then to approve and enforce the plan as so amended by it. In other words, since the District Court had, in effect, disapproved the plan submitted as unfair and inequitable,[189] it had no choice but to reject the plan, deny enforcement and remand to the Commission for appropriate action. Its failure so to do constituted a reversible error, for which

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188 The reference of the District Judge (Leahy, *J.*) to "premium" is an inaccurate characterization, as the plan does not call for the payment of a "premium" as such, but an amount equivalent to the redemption price. Such reference reflects a "nominal" approach which begs the question.

189 In its opinion on rehearing, the court below indicated that the "district Court found the plan to be unfair and inequitable and rejected it." (R. 140).

the court below correctly vacated the District Court's decree and directed the remand to the Commission for its action (*i. e.*, valuation).[190] Such was the determination of the court below when it said:

> "Though a district court of the United States sitting pursuant to the provisions of Section 11(e) may reject a plan, if cannot value the securities, find equitable equivalents therefor and substitute its own estimates for those of the Commission requiring the plan as amended by it to be carried out. *To put the matter briefly, a district court may reject but not amend the plan. The court below, therefore, erred in one particular. It entered an order approving and enforcing the plan as amended by it. It was without power to do this.* The provisions of Section 11(e) make it clear that the Commission in the first instance must approve the plan and find it to be fair and equitable. If, as here, the district court disagrees with the conclusion of the Commission that the plan is fair and equitable, it must refuse to approve the plan and 'remand' the record to the Commission for further and appropriate action by it" (R. 39). (Italics ours.)

The principle enunciated by the court below that a section 11(e) court may disapprove and reject a plan, but not amend and then approve it has been uniformly applied by the courts.[191] A district court

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[190] In referring to the action to be taken by the Commission, the court below said:

> "* * * The problem is and will remain, until its disposition by the Commission, one of valuation of the securities of Engineers, viz., the preferreds and the common" (R. 40).

[191] *In re Laclede Gas Light Co.*, 57 F. Supp. 997 (E. D. Mo., 1944), aff'd *sub nom. Massachusetts Mutual Life Ins. Co. v. S. E. C.*, 151 F. (2d) 424 (C. C. A. 8, 1945), cert. den. 327 U. S.

[Footnote continued on following page.]

cannot (as the instant District Court attempted) approve a plan in part and disapprove it in part.[192] Furthermore, it cannot rewrite the plan and then approve.[193] Accordingly, the District Court in the case at bar did not have the power to amend the plan so as to reduce the compensation proposed to be paid to the preferred stockholders any more than it could change the method of payment from cash to kind, or modify any other part of the plan.[194] Nor was it free to change any of the provisions as to the

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[Footnote continued from preceding page.]

795; *In re Kings County Lighting Co.*, 72 F. Supp. 767 (S. D. N. Y., 1947), aff'd *sub nom. Public Service Commission of N. Y.* v. *S. E. C.*, 166 F. (2d) 784 (C. C. A. 2, 1948); *In re Electric Bond & Share Co.*, 73 F. Supp. 426 (S. D. N. Y., 1946); *In re Eastern Minn. Power Corp.*, C. C. H. Fed. Sec. Serv., Para. 90, 399-1 (D. Minn., 1947); *Matter of Northern States Power Company*, unreported, decided Aug. 30, 1948 (D. 4th), D. Minn., Civil Action No. 2673.

192 *In re Laclede Gas Light Co., supra.*

193 Thus in *In re Electric Bond & Share Co., supra*, it was held:

> "* * * The Court cannot *amend* or *modify* the plan and then enter an order of approval since §11 (e) provides that the plan must in the first instance be approved by the Commission. The function of the Court is to approve and enforce the plan of reorganization submitted to it, if it finds such plan fair and equitable and appropriate to effectuate the purposes of the Act. * * *" (73 F. Supp. 443).

194 That such amendment is not permitted is evident from the following statement by the District Court in the *Kings County* case, *supra*:

> "* * * I agree thoroughly with the position taken by counsel for the State Commission that, under my narrow statutory jurisdiction I could not *amend* a proposed plan. For example, I could not, in the case at bar approve the plan on condition that Long Island receive, not 7½% of its present common stock holding, but 3¾%, this representing a compromise between the views expressed by the two commissions. Any such disposition would be wholly without jurisdiction" (72 F. Supp. 774).

stockholders' rights under the plan.[195] Unquestionably, any change in the *quantum* of participation to be accorded the stockholders necessarily alters substantial rights.

Likewise, this principle limiting the district court's power to amend a plan has been applied to analogous situations arising under section 77 of the Bankruptcy Act. Thus in section 77 proceedings, where the district court's approval is required in all cases, that court can only pass upon such plans as are certified to it[196] and has no power to amend the plan,[197] but is limited to approval or disapproval, in which latter event it must either dismiss the proceedings or refer the plan to the Interstate Commerce Commission.[198] Furthermore, even the "interest of speed" or expedi-

[195] In the *Public Service Commission* case, *supra*, which affirmed the *Kings County* case, *supra*, the Court of Appeals for the Second Circuit apparently imposed a stricter limitation upon the district judge's power of approval, stating:

> "We will take up the last objection first. We may assume for argument that the judge's power was limited to an approval or a rejection of the plan, as it stood. He held that, nevertheless, the condition that the plan should be submitted to the PSC for its approval was not an 'essential' part of the plan, and that for this reason he was free to disregard it. *In this he was right, not indeed because he would have been free to change any of those provisions for the issue of securities or the alteration of shareholders' rights which made up the plan, which he thought not to be 'essential';* but because, as we shall show, §11(e) did not require the consent of the PSC, and because submission to that commission was not part of the plan at all; but, as it itself declared, only one of the 'steps to be taken to make the amended plan effective' " (166 F. (2d) 786). (Italics ours.)

[196] *In re New York, N. H. & H. R. Co.*, 27 F. Supp. 392 (D. Conn., 1938), aff'd 104 F. (2d) 1018 (C. C. A. 2, 1939).

[197] *In re New York, N. H. & H. R. Co.*, 54 F. Supp. 595 (D. Conn., 1943), aff'd in part and rev'd in part on other grounds 147 F. (2d) 40 (C. C. A. 2, 1945), cert. den. 325 U. S. 884 (1945).

[198] *In re Erie R. Co.*, 37 F. Supp. 237 (D. Ohio, 1940), aff'd 133 F. (2d) 730 (C. C. A. 6, 1943), cert. den. 320 U. S. 748 (1943).

tion does not justify the judicial amendment or modification of a plan submitted by the Commission.[199]

In addition, the Commission's so-called amendatory order of February 11, 1947, and the District Court's adoption of the escrow resulted in the restoration of the splitting features of the original plan,[200] after they had been withdrawn, by separating part of the plan it disapproved and so constituted substantive changes of valuable rights[201] without authority in law so to do, as indicated above at p. 155. In any event the Commission's amendatory order and its consent to the escrow do not satisfy the statutory requirement of approval by both the Commission and the District Court. Nor can this requirement be waived by either the Commission or the District Court. The

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[199] *In re Alton R. Co.*, 159 F. (2d) 200 (C. C. A. 7, 1947); *In re Chicago, R. I. & P. Ry. Co.*, 162 F. (2d) 257 (C. C. A. 7, 1947).

Thus, in the *Alton* case, *supra*, where the District Court in the interest of speed rewrote certain provisions of the plan after its approval by the Interstate Commerce Commission, and the security holders, the Court of Appeals reversed the District Court order, rejecting the argument as to the District Court's authority to rewrite in connection with its supervision of the execution of the plan.

The *Alton* case, we believe, cannot be distinguished from the instant case, in which the plan as approved by the Commission and submitted to the court contained none of the provisions concerning the treatment of the preferred stockholders which were incorporated by Paragraph 6 of the court's order (R. 321a). Nor does the District Court's desire for speed in the instant case justify its attempt to change the plan any more than in the *Alton* case.

[200] Although counsel for Engineers had made a motion to separate Parts I and II of the plan and for an order permitting the consummation of Part I, the Commission found that it could not grant the motion to split the plan, but stated that it would approve an amendment to provide for escrow in the event of further litigation as to the rights of the preferred stockholders (R. 75a).

[201] The Commission does not view the amendatory order as an amendment to the plan (R. 169a, 389a).

court below expressed itself on this point in the following language:

> "* * * we are of the opinion that *neither the Commission, nor the District Court, nor this court possesses the power to waive the provision of Section 11(e), providing for approval of a plan of reorganization* as fair and equitable by the Commission and by the District Court. *Moreover, we cannot treat the Commission's amendatory order of February 11, 1947 or its approval of the escrow agreement as a rejection of the role imposed on the Commission by Congress.* The correctness of our position in this regard is demonstrated by the fact that the amendatory order of the Commission provides that the escrow agent may make payment to the preferred stockholders only when the order of the District Court has become final and not subject to appeal. What the Commission intended to effect by the order was nothing more than the establishment of a means for expediting the execution of the plan of reorganization when the approval required by the statute had been attained" (R. 139). (Italics ours.)

As the District Court disapproved the plan as unfair and inequitable and the requisite concurrent approval is lacking, the District Court was required to remand the cause to the Commission for appropriate action. This procedure which the court below correctly ordered has been uniformly followed. *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80 (1943); *Schwabacher* v. *U. S.*, 334 U. S. 182 (1948). Both of these Supreme Court cases involved the treatment to be accorded stockholders under a statutory reorganization plan. Thus in the first *Chenery* case, *supra*, where an order of the Commission approving a reor-

ganization plan under the Act, was reversed as based upon inapplicable judicial precedents, this Court directed the remand to the Commission for appropriate action in accordance with its opinion. As stated in the *Chenery* case, *supra*:

> "* * * But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. *If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment.* For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency" (318 U. S. 88). (Italics ours.)

Similarly, in an analogous situation in the *Schwabacher* case, *supra*, this Court again directed a remand to the Interstate Commerce Commission for reconsideration as that Commission may have failed to consider the effect of certain rights of stockholders upon the "intrinsic or market values". In view of the foregoing authorities, the decision of the court below correctly requires the remand to the Commission for valuation in accordance with its opinion, where the plan has been disapproved.[202]

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[202] As noted above, the question of remand has been argued on the assumption that the disapproval of the plan was correct, but that disapproval is of course challenged by the Streeter group of preferred stockholders.

Conclusion.

By reason of the foregoing, the judgment of the court below should be reversed and, by appropriate direction to the District Court, the plan approved by the Commission should be enforced insofar as it provided for the payment to the preferred stockholders of the amounts equal to the respective redemption prices of their stock (less $100 per share already received) plus adequate recompense for the delay in payment. In the event, and only in the event, that this Court finds that the Commission erred, as a matter of law, in the valuation process, this proceeding should be remanded to the Commission for its further action in conformity with the instructions of this Court.

Respectfully submitted,

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APPENDIX A

Section 11(d), (e) and (f) of the Public Utility Holding Company Act of 1935 [15 U. S. C. 79k(d) (e) and (f)] provides as follows:

"(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 79r of this chapter, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b) the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

"(e) In accordance with such rules and regulations or order as the Commission may deem neces-

sary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan thereto-

fore approved by the court and the Commission, the assets so possessed.

"(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of in-

vestors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission."

Section 18(f) of said Act [15 U. S. C. §79r(f)] provides as follows:

"(f) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the district court of the United States for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this chapter."

Section 19 of said Act [15 U. S. C. §79s] provides as follows:

"Hearings may be public and may be held before the Commission, any member or members

thereof, or any officer or officers of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before the Commission, the Commission, in accordance with such rules and regulations as it may prescribe, shall admit as a party any interested State, State commission, State securities commission, municipality, or other political subdivision of a State, and may admit as a party any representative of interested consumers or security holders, or any other person whose participation in the proceedings may be in the public interest or for the protection of investors or consumers."

Section 24(a) of the said Act [15 U. S. C. §79x(a)] provides as follows:

"Any person or party aggrieved by an order issued by the Commission under this chapter may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No

objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended [28 U. S. C. §1254]."

APPENDIX B

Section 11(c) and (d) of the Public Utility Holding Company Bill S. 1725 (Hearings before Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., p. 19 ff.) provides as follows:

"(c) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order under this section. Upon any such application, the court shall take possession and exclusive jurisdiction for the purposes of this act of such assets of the company, wherever located, as may be held in contravention of such order, or, in the case of any order for reorganization or dissolution, possession, and exclusive jurisdiction for the purposes of this Act of the company and all of its assets, wherever located; and the court shall have jurisdiction, and it shall be the duty of the court, to constitute and appoint the Commission as sole trustee to administer the assets so possessed and the proceeds thereof as a trust estate for the benefit of the persons interested therein as their interests may appear. *In any proceedings for the enforcement of an order of the Commission under this section, the Commission with the approval of the Court shall have power to dispose of any or all such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be prepared in the first instance by the Commission,* or, subject to such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide

interest (as defined by the rules and regulations of the Commission) in the reorganization.

"(d) If, in the judgment of the Commission, any registered holding company or any subsidiary company thereof is insolvent or unable to pay its debts as they mature, the Commission shall have power to institute proceedings for the reorganization of such company under Section 77B of the Act of July 1, 1898, entitled 'An act to establish a uniform system of bankruptcy throughout the United States', as amended. In any such proceedings or in any other proceedings in a court of the United States, whether under said Section 77B or otherwise, by whomsoever instituted, for the reorganization or liquidation of any registered holding company or subsidiary company thereof or in which a receiver or trustee of any such company or any assets thereof is appointed, the court, at the request of the Commission, shall have jurisdiction, and it shall be the duty of the court, to constitute and appoint the Commission as sole trustee or receiver, whether or not a trustee or receiver shall theretofore have been appointed. *In any such proceedings a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for a hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be prepared in the first instance by the Commission* or, subject to such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as

defined by the rules and regulations of the Commission) in the reorganization. All fees, expenses, and remuneration paid in connection with any reorganization or liquidation of a registered holding company or subsidiary company thereof, whether under said section 77B or otherwise, shall be subject to the approval of the Commission. The Commission shall be entitled to such reasonable compensation for its services as trustee or receiver in any proceedings as the court may allow." (Italics ours.)

Excerpt from analysis of S. 1725 (Hearings Before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., p. 49):

"Subsections (c) and (d) outline the procedure whereby the reorganization plans must be approved by the Commission and carried out under court supervision. The court is to take jurisdiction of the assets involved and appoint the Commission sole trustee or receiver to administer the assets as a trust estate for the benefit of the persons interested therein as their interest may appear. By these provisions it is intended to give the Commission the complete supervisory power which is essential to the elimination of the present wasteful practices in corporate reorganizations. It also ensures the investors that their properties will not be needlessly sacrificed but will be conserved by the Commission and court until a satisfactory reorganization can be arranged. If a company is solvent, the court could continue the payment of interest and in appropriate cases dividends, until a prudent reorganization is effected. If it is insolvent or unable to

pay its debts, the Commission is empowered by subsection (d) to institute proceedings for the reorganization of the company under Section 77B of the Bankruptcy Act; in such proceedings, also, the Commission could have itself appointed sole trustee. Under either subsection Commission approval of reorganization plans and supervision of the conditions under which such plans are prepared will make it impossible for a group of favored insiders to continue their domination of inarticulate and helpless minorities, or, as is more often the case majorities. All fees and expenses and remuneration paid in connection with any such reorganization, whether under section 77B of the Bankruptcy Act or otherwise, are made subject to the approval of the Commission. The court is to allow the Commission reasonable compensation for its services as trustees."

APPENDIX C

Section 11(d), (e) and (f) of the Public Utility Holding Company Bill S. 2796 (74th Cong., 1st Sess.) provides as follows:

"(d) The Commission may apply to a court in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order under this section. Upon any such application, the court as a court of equity shall take exclusive jurisdiction and possession, for the purposes of this title, of such assets of the company or companies, wherever located, as may be the subject of such order, or, in the case of any order for reorganization or dissolution, exclusive jurisdiction and possession, for the purposes of this title, of the company or companies and all the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court shall have the power, and it shall be the duty of the court, to constitute and appoint the Commission as sole trustee, to administer under the direction of the court the assets so possessed and the proceeds thereof as a trust estate for the benefit of the persons interested therein as their interests may appear. In any proceeding for the enforcement of an order of the Commission under this section, the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance *with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing.* Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such

rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

"(e) *In accordance with such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers,* any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for the reorganization or dissolution, of such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of this title and the rules, regulations and orders thereunder or to make unnecessary the issuance of any order by the Commission in respect of any such company under subsection (b). *If, after notice and opportunity for hearing, the Commission shall approve such plan, as submitted or as modified to meet such terms and conditions as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers, as fair and equitable to the persons affected by such plan and as appropriate to effectuate the provisions of this title and the rules, regulations, and orders thereunder, the Commission shall make an order authorizing and directing such company or any subsidiary company thereof to divest itself of control, securities, or other assets or to be reorganized or dissolved*

in accordance with such plan; and the Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with such order. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of this title and the rules, regulations, and orders thereunder, the court shall take exclusive jurisdiction and possession, for the purposes of this title, of such assets of the company or companies wherever located, as may be the subject of such order; or, in the case of any order for reorganization or dissolution, exclusive jurisdiction and possession, for the purposes of this title, of the company or companies and all the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court shall have power, and it shall be the duty of the court, to constitute and appoint the Commission as sole trustee, to administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed and the proceeds thereof as a trust estate for the benefit of the persons interested therein as their interest may appear. It shall be within the authority of the court and the Commission to approve and carry out any plan under this subsection which it would be within their respective authority to approve and carry out under subsection (d) of this section.

"(f) If, in the judgment of the Commission, any registered holding company or any subsidiary company thereof is insolvent or unable to pay its debts as they mature, the Commission shall have

power to institute proceedings for the reorganization of such company under Section 77B of the Act of July 1, 1898, entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', as amended. In any proceeding pursuant to this section or in any other proceeding in a court of the United States, whether under said section 77B or otherwise, by whomsoever instituted, for the reorganization, dissolution, liquidation, bankruptcy, or receivership of any registered holding company or subsidiary company thereof or in which a receiver or trustee of any such company or any assets thereof is appointed, the court shall have jurisdiction to appoint a trustee or receiver, and, at the request of the Commission, shall have power, and it shall be the duty of the court to constitute and appoint the Commission as sole trustee or receiver, whether or not a trustee or receiver shall theretofore have been appointed. *In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission* or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public

interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, whether said section 77B or otherwise, shall be subject to approval by the Commission. The Commission shall be entitled to such reasonable compensation for its services as trustee or receiver in any proceeding as the court may allow." (Italics ours.)

Excerpts from S. Rep. No. 621, 74th Cong., 1st Sess.

At page 8:

"The committee has further added a new provision to the so-called 'elimination' section to provide the machinery for voluntary readjustments by the companies. These voluntary readjustments are to be *carried out under Commission supervision* in order to effectuate the policies of title I. This makes it possible for companies to submit their own readjustment plans for the examination and approval of the Commission at any time after the enactment of the title and to have those plans carried out if necessary in the Federal courts of equity." (Italics ours.)

At pages 13-14:

"(a) Voluntary readjustment.—* * *

"Section 11 provides that plans for the voluntary readjustment of the affairs of holding companies to conform with the section may be presented to the Federal courts at any time and that in such cases those courts may exercise in the furtherance of such voluntary plans all the extra-

ordinary powers such courts have been accustomed to exercise when called upon under the Sherman and Hepburn Acts to effect compulsory corporate readjustments required by the public policy expressed in those acts.

* * * * *

"(b) Compulsory readjustment.—In the case of those holding companies which at the end of the 5 years may not have completed for themselves the task of transformation into an investment trust or of rearrangement of their properties into a single integrated system, the Securities Commission is given power to take them into the Federal courts to require compliance with the title in one or the other way. The process of compulsory divestment of control is left to the Federal courts, without time limit, for the application of the technique worked out in the dissolutions under the Sherman Act and the Hepburn Act (commodities clause).

"The title provides that during all court processes the Securities and Exchange Commission shall act as an impartial expert economic adviser and administrative assistant to the courts. That expert assistance will enable the courts to save time and expense in the solution of essentially economic and administrative problems for which in the Sherman Act cases it had no assistance except that of opposing counsel. But the courts can take such time as they deem advisable to dispose of assets without sacrifice"

At page 33:

"Subsections (d), (e), and (f) outline the procedure whereby the reorganization plans must be approved by the Commission and carried out

under the supervision of the Federal courts. The court is to take technical jurisdiction of the assets involved and appoint the Commission sole trustee or receiver to administer the assets as a trust estate for the benefit of the persons interested therein as their interests may appear. By these provisions it is intended to give the Commission the complete supervisory power which is essential to the elimination of the present wasteful practices in corporate reorganizations. * * * Subsection (e) expressly authorizes a holding company subject to the approval of the Commission and the court to work out a plan of reorganization to make unnecessary the issuance of an involuntary order for its reorganization by the Commission, and the Commission and the court are authorized to approve any plan so worked out voluntarily by a holding company as the Commission and the court might order under their compulsory powers. * * * If a company is insolvent or unable to pay its debts, the Commission is empowered by subsection (f) to institute proceedings for the reorganization of the company under section 77B of the Bankruptcy Act; in such proceedings also, the Commission could have itself appointed sole trustee. Under these subsections, Commission approval of reorganization plans and supervision of the conditions under which such plans are prepared will make it impossible for a group of favored insiders to continue their domination over inarticulate and helpless minorities, or even as is often the case, majorities. Fees, expenses, and remuneration paid in connection with any such reorganization, whether under section 77B of the Bankruptcy Act or otherwise, are made subject to the approval of the Commission.

APPENDIX D.

Excerpts from Congressional Record, Vol. 79, 74th Cong., 1st Sess., p. 8845:

"MR. BORAH. Mr. President, I desire to ask the Senator from Montana [Wheeler] a question. On page 50, beginning with line 2, the bill provides as follows:

> 'In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court.'

I do not exactly understand that language. Does it mean that the court's jurisdiction with reference to the reorganization, or what shall be permitted by decree of the court, is limited; or is it merely recommendatory to the court?

"MR. WHEELER. We do exactly the same thing at the present time, as I understand, with reference to the Interstate Commerce Commission. A plan for the reorganization of a railroad is supposed to be submitted to the Interstate Commerce Commission for its approval before it is approved by the court. We put this provision in here in exactly the same manner, as I recall, as the existing provision with reference to the Interstate Commerce Commission in the case of railroad reorganizations.

* * * *

"MR. STEIWER. In respect to the language which is now under discussion, at the top of page 50, has there been urged upon the committee, or brought to the attention of the chairman, the con-

tention that that language would oust the court of its jurisdiction, and, therefore, would be objectionable?

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"MR. WHEELER. No; I do not think it would oust the jurisdiction of the court. I think there is no question that Congress would have the power to say that the court shall, when it appoints a receiver, appoint the Commission receiver, because, after all, the court is a statutory court, and we have the right to say that before this plan is approved by the court it shall be approved by the Commission. Furthermore, this is a mere matter of Congress providing the administrative machinery surrounding receiverships, and in no way usurping any judicial powers. The judicial functions remain, as always, in the court.

If I am not mistaken about the matter, we employ exactly that procedure in railroad reorganizations at the present time; and the only complaint we have had has been that the Interstate Commerce Commission has been too lenient, and has approved a number of plans which should not have been approved.

"MR. STEIWER. I make no contention about the matter at this time, but it occurs to me that provision might be subject to the objection that it would oust the jurisdiction of the court.

"MR. WHEELER. The Senator from Indiana [Mr. Minton] has called my attention to the fact that the provision does not oust the jurisdiction of the court at all, because the court has to approve the plan even though the Commission approves it. In other words there is really a double check upon the plan, and final determination rests as in the past in the courts."